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No. 11640

W. 2476

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT STROUD, Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz Island, California,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JUN 18 1947

PAUL H. BARTEN,

CLERK

No. 11640

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT STROUD, Appellant,

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Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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NAMES AND ADDRESSES OF ATTORNEYS

ROBERT STROUD,

P. M. B. 594,
Alcatraz, California.

In Pro. Per. for Appellant.

FRANK J. HENNESSY,

United States Attorney,
Attorney for Appellee.

In the United States District Court for the
Northern District of California,
Southern Division

No. 26895-H

ROBERT STROUD, Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,
Respondent.

To The Honorable A. F. St. Sure, Senior District
Judge:

PETITION FOR TEMPORARY WRIT
OF HABEAS CORPUS

Comes now, Robert Stroud, who, being duly sworn, upon his oath states that he is a citizen of the United States by birth, of legal age, and at the present time an inmate of the United States penitentiary on Alcatraz Island, California, a place within the jurisdiction of this Court and under the exclusive jurisdiction of the United States; that he has a statement he is required by law, in the public interest, to make before the United States Commissioner at San Francisco at earliest possible moment; that said statement falls within the legal jurisdiction and official duties of Francis St. J. Fox, United States Commissioner at San Francisco;

Therefore, petitioner prays that this Court issue a temporary writ of habeas corpus ordering the Warden of said penitentiary to surrender the body

of petitioner, together with his legal papers, to the custody of the United States Marshal, and ordering said Marshal to transport petitioner and his papers to the office of the United States Commissioner at San Francisco, there permit petitioner to make his statement and transact all lawful business essential thereto and, at the termination of said legal business, to return the body of petitioner safely to the custody of the aforementioned Warden of the United States penitentiary at Alcatraz, California.

/s/ ROBERT STROUD, No. 594
Alcatraz, California, per se.

State of California,
County of San Francisco—ss.

Subscribed and sworn to before me this 27 day of December, A. D. 1946.

E. J. FULLER,
Associate Warden, United States Penitentiary, Alcatraz, California. Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary Alcatraz, California, indicate that Robert Stroud is a citizen of the United States.

Filed Feb. 18, 1947.

[Title of District Court and Cause.]

ORDER DENYING WRIT

Petition for temporary writ of habeas corpus having been presented to the Court for consideration, and having been duly considered,

It Is Ordered that the petition be, and the same is hereby, Denied.

Dated: February 20, 1947.

GEORGE B. HARRIS,
Judge.

Filed Feb. 20, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Court and the United States
Attorney:

You, and each of you, take notice that the petitioner herein hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of Judge Harris, entered herein on February 20, 1947, dismissing the petition.

/s/ ROBERT STROUD, No. 594,
Alcatraz, California,
In Propria Persona.

April 21, 1947.

Filed Apr. 24, 1947.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk:

You will please prepare the record on appeal in the above-entitled cause and include therein the following items:

1. The Petition.
2. Judge Harris' Order dismissing same.
3. Notice of Appeal.
4. This Praecipe.
5. Any Orders which may be entered concerning this appeal.

/s/ ROBERT STROUD, No. 594,
Alcatraz, California,
In Propria Persona.

April 21, 1947.

Filed April 24, 1947.

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 5, inclusive, contain a true, full and correct transcript of the records and proceedings in the cause entitled: Robert Stroud, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Respondent, No. 26895-H in Habeas Corpus, as the same now remain on file and of record in my office.

I further certify that the cost of the foregoing transcript of record is \$4.00 and that said sum has been paid to me by the Appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 28th day of April, A. D. 1947.

[Seal]

C. W. CALBREATH,
Clerk,

/s/ E. H. NORMAN,
Deputy Clerk.

[Endorsed]: No. 11640. United States Circuit Court of Appeals for the Ninth Circuit. Robert Stroud, Appellant, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz Island, California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 31, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11,640

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

ROBERT STROUD,

Appellant,

VS.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz Island, California,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,
Post Office Building, San Francisco,
Attorneys for Appellee.

FILED

JUL 28 1947

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No. 11,640

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

ROBERT STROUD,

Appellant,

VS.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz Island, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying the application of appellant which he designated as a "petition for temporary writ of habeas corpus." (Tr. p. 4.) The appellant has cited certain sections of the United States Code in support of his contention that the Court below had jurisdiction to issue such a writ, but a reading of these sections of the United States Code will show that none of them are authority for the proposition that the Court below had jurisdiction to grant the relief as prayed for.

The appellee does not, however, attack the jurisdiction of this Honorable Court to proceed in this appeal under the authority cited by the appellant.

STATEMENT OF THE CASE.

This is an appeal from an order of the Court below denying the application of appellant, which he designated as a petition for temporary writ of habeas corpus. (Tr. p. 4.) The appellant, an inmate of the United States Penitentiary at Alcatraz Island, California, sought by the application hereinabove mentioned to compel the Court below to order the appellee, the Warden of the United States Penitentiary at Alcatraz Island, California, to bring him before the United States Commissioner at San Francisco, California, so that he could "make his statement and transact all lawful business essential thereto", and that thereafter, at the termination of said "legal business", to return him safely to the custody of the said appellee. (Tr. pp. 2-3.)

The Court below thereafter filed the following order denying appellant's application:

"Petition for temporary writ of habeas corpus having been presented to the court for consideration, and having been duly considered,

"It is ordered that the petition be and the same is hereby denied." (Tr. p. 4.)

From this order appellant now appeals to this Honorable Court. (Tr. p. 4.)

ISSUE.

Does a United States Court have the power to order the Warden of a United States Penitentiary to bring an inmate before a United States Commissioner so that the said inmate may transact certain "Legal Business".

CONTENTION OF APPELLEE.

The answer to the above stated question is, of course: No.

ARGUMENT OF APPELLEE.

The appellant in his brief (page 4) admits that he can find no cases to support the proposition which he advances. To quote him: "The appellant has no training in law, no legal library, and he knows of no case law touching directly upon the point involved in this case * * *" He then goes on to say, however, that he believes the Constitution of the United States guarantees him this protection. He also states that the statute defining the powers and duties of the United States Commissioner may be deemed to justify his contention. This, of course, the appellee disputes. There is no law to sustain the appellant, either Court decisions or statutory law or constitutional provisions.

It is undisputed that the appellant has, by correspondence, access to the Courts and the office of the United States Attorney and the Attorney General. If he has any grievances, let him state them to these

authorities, and if any of his constitutional rights have been violated, he will receive appropriate relief.

In *Walker v. Johnston*, 312 U.S. 275, it was held by the Supreme Court of the United States that where a writ of habeas corpus is issued to test a prisoner's allegation of an illegal restraint of his liberty, the United States Commissioner can not serve as a referee and present his findings to the Court for its approval in lieu of the Court's own findings in the matter.

Furthermore, in *Price v. Johnston*, 159 Fed. (2d) 234, this Honorable Court held that it could not compel the Warden to bring the appellant before it to argue his appeal. Since this Honorable Court does not have the power to compel the Warden of a United States Penitentiary to deliver an inmate before it to argue his appeal, how can it be logically argued that the Court below would have the power to order a prisoner before a Commissioner so that he can state his grievances or transact certain legal business? It is to be noted that the appellant never indicated in his petition the nature of the legal matters he desires presented.

The appellant has been committed to the custody of the Attorney General. The Warden has been designated by the Attorney General as the appellant's custodian. The appellant can only be ordered brought before the Court to challenge the jurisdiction of the trial Court or complain of an unconstitutional deprivation of his liberty (Writ of Habeas Corpus Ad Subjiciendum), or to testify as a witness in a pending proceeding before a Court when and if such testimony

is required (Writ of Habeas Corpus Ad Testificandum), or to be prosecuted, should he be under indictment or information (Writ of Habeas Corpus Ad Prosequendum). None of these situations is present here.

SUMMARY.

The appellant has failed to state a cause of action. His appeal might properly have been dismissed on appropriate motion that it was frivolous and without merit. However, appellee prefers this method of adjudicating the matter, believing that this Honorable Court will render its decision that the Court below has no jurisdiction to order the type of relief as prayed for by appellant, and thus discourage such useless and burdensome litigation.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below is correct and should be affirmed.

Dated, San Francisco,
July 28, 1947.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.

No. 11641

United States
Circuit Court of Appeals
For the Ninth Circuit.

B. M. PHELPS and ALICE E. PHELPS,
Appellants,
vs.

FLOYD HANSON, EZRA HANSON, SARA
HANSON and EVA M. HAMMOND,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

FILED

JUL 1947

PAUL P. O'BRIEN,

CLERK

No. 11641

United States
Circuit Court of Appeals
For the Ninth Circuit.

B. M. PHELPS and ALICE E. PHELPS,
Appellants,
vs.

FLOYD HANSON, EZRA HANSON, SARA
HANSON and EVA M. HAMMOND,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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Billings, Montana,

Attorneys for Appellees and Defendants.

In the District Court of the United States for the
District of Montana, Billings Division

No. 775

B. M. PHELPS and ALICE E. PHELPS,
Plaintiffs,

vs.

FLOYD HANSON, EZRA HANSON, SARA
HANSON and EVA M. HAMMOND,
Defendants.

AMENDED COMPLAINT

Come now the plaintiffs in the aove-entitled action
and for cause of action against the defendants com-
plain and allege:

I.

That the jurisdiction of this court attaches by vir-
tue of the fact that the rights of plaintiffs claimed
herein arise under a treaty entered into on May
7, 1868, by and between the United States of Amer-
ica and the Crow Tribe or Nation of Indians, which
said treaty was ratified by the Senate of the United
States on July 25, 1868 (15 Stat., L. 649), and pro-
claimed August 12, 1868, by the President of the
United States, a copy of which treaty is hereto at-
tached, marked Exhibit "A" and made a part
hereof. That the value of the matter in controversy
exceeds, exclusive of costs, the sum of Three Thou-
sand Dollars (\$3,000).

II.

That plaintiffs are citizens and residents of the State of Montana. That the property rights of plaintiffs described herein are located wholly within the state and district of Montana. That the defendant, Eva M. Hammond, is a citizen and resident of the State of Montana. [3*] That the defendants, Floyd Hanson, Ezra Hanson and Sara Hanson, are citizens and residents of the State of Wyoming. That the wrongful acts of the defendants, consisting of illegal diversions of the waters of the south fork of Dry Head Creek, as hereinafter alleged, occur wholly within the state and district of Montana.

III.

That during all of the times herein mentioned, plaintiffs have been, and now are, either the equitable or legal owners and in possession of those certain parcels of land situate, lying and being within the County of Big Horn, State of Montana, and more particularly described as follows, to-wit:

The North Half of the Northwest Quarter ($N\frac{1}{2}NW\frac{1}{4}$) and the Northwest Quarter of the Northeast Quarter ($NW\frac{1}{4}NE\frac{1}{4}$) of Section Nine (9); the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$) and the North Half of the Northeast Quarter of Section Ten (10), formerly the Charles M. Phelps Crow Allotment No. 2170; the Northeast Quarter of the Northeast Quarter ($NE\frac{1}{4}NE\frac{1}{4}$) of Section Nine (9) and the Northwest Quarter of the

* Page numbering appearing at foot of page of original certified Transcript of Record

Northwest Quarter of Section Ten (10), formerly the Pearl Scott Crow Allotment No. 950; the Northwest Quarter of the Northwest Quarter of Section Eleven (11), all in Township Seven (7) South, Range Twenty-eight (28) East, M.P.M., and the appurtenances thereto.

IV.

That during all of the times herein mentioned, a certain creek, commonly known as the south fork of Dry Head Creek, arises in the Pryor Mountains and has its source in Township Seven (7) South, Range Twenty-eight (28) East, M.P.M., in Carbon County, Montana, and flows thence in a northerly direction approximately three miles across Townships Seven and Eight (7 & 8) South of Range Twenty-eight (28) East, M.P.M., and across the above-described lands of the plaintiffs and thence emptying into Dry Head Creek, in Big Horn County, Montana, tributary to the Big Horn River.

V.

That by virtue of the Treaty of May 7, 1868 (15 Stat. 649), a certain tract of land in the then Territory but now State of Montana, was set aside and reserved for the use of the Crow Indians, as a home and abiding place of said Indians. That said tract of land so set aside for the use of said Indians, except only as the exterior boundaries of said reservation were altered and the lands within the reservation diminished by further treaties between the United States and said Crow Tribe or Nation of Indians, (22 Stat. 42), (26 Stat. 1039), (33 Stat.

353, 357), has since May 7, 1868, been and now is an Indian Reservation, the home and abiding place of the said Crow Tribe or Nation of Indians, and that the exterior boundaries of said Crow Indian Reservation, since April 27, 1904, have been and now are particularly described as follows:

Beginning at the intersection of the 107th Meridian and the boundary line between Montana and Wyoming; thence due North on the 107th Meridian to a point due East of the Northeast corner of the Fort Custer Military Reservation; thence due West to the Northwest corner of the Fort Custer Military Reservation; thence due South to the Southwest corner of the Fort Custer Military Reservation; thence due West to the intersection of the line between Sections Ten and Eleven (10 & 11), Township Two (2) South, Range Twenty-eight (28) East, of the principal meridian of Montana; thence due North to the intersection of the Montana base line; thence due West to the intersection of a line running in a Southwesterly direction, following the top of the natural divide between the waters flowing into the Yellowstone and Clarks Fork Rivers upon the West and those flowing into Pryor Creek and West Pryor Creek on the East, said line extending from the Northwest corner of Section number Thirty-six (36), Township number Two (2) North, of Range Twenty-seven (27) East of the principal meridian of Montana, to the base of West Pryor Mountain; thence in a Southwesterly direction

along said line to the base of West Pryor Mountain; thence due South and up the North slope of said Pryor Mountain on a true Meridian line to a point fifteen (15) miles due North from the established line between Montana and Wyoming; thence in a due Easterly course on a parallel of latitude to a point where it [5] intersects the mid-channel of the Big Horn River; thence following up the mid-channel of said river to a point where it crosses the Montana and Wyoming State Line; thence due East along the established line between Montana and Wyoming to the point of beginning; and that all lands within such boundaries now constitute the Crow Indian Reservation and are located within the State of Montana.

VI.

That the lands and the rights to the use of the waters of the south fork of Dry Head Creek, owned and possessed by the plaintiffs, were located within the boundaries of the Crow Indian Reservation as established by the Treaty of May 7, 1868, and are still located within the boundaries of the Crow Indian Reservation as diminished by further treaties between the United States and the Crow Tribe of Indians. That the lands of plaintiffs herein described and their rights to the use of the waters of the south fork of Dry Head Creek are located within the state and district of Montana.

VII.

That it was the intent and purpose of the United

States of America in entering into the above-mentioned treaties, that the said Indians who had theretofore been a wandering, nomadic people, be encouraged to reside at one place and be trained to habits of industry, to till the soil, to care for their stock, and to promote their civilization, and to that end Paragraph 6 of the Treaty of May 7, 1868, was incorporated therein.

VIII.

That by the establishment of the Crow Indian Reservation, on May 7, 1868, the United States became the trustee of the Crow Tribe of Indians, holding legal title to all of the lands and waters of the Crow Indian Reservation and at that time, on May 7, 1868, there was then reserved to said Indians and their successors in interest for irrigation and other beneficial uses upon the [6] lands of said reservation, and exempted from appropriation under territorial or state laws or otherwise, all of the waters of reservation streams necessary for the successful irrigation of irrigable lands upon said reservation, including all of the waters of the south fork of Dry Head Creek, which are necessary for the successful irrigation of plaintiffs' lands herein described.

IX.

That since the year 1902, Charles M. Phelps, the father of plaintiff, B. M. Phelps, and the predecessors in interest of plaintiffs, have continuously diverted and put to beneficial use the waters of the south fork of Dry Head Creek for the irrigation of lands of plaintiffs hereinabove described.

X.

That the aforesaid lands of plaintiffs are dry and arid in character and will not without artificial irrigation produce crops. That plaintiffs' predecessors in interest constructed a dam in the south fork of Dry Head Creek and an irrigation system to carry the waters of said creek to said lands. That with the assistance of artificial irrigation from the south fork of Dry Head Creek, said lands will produce and have produced crops of hay, grain, and vegetables, with the exception of the years 1944 and 1945 as herein set forth.

XI.

That during the months of May, June, July, August, and September of each year the flow of water in the south fork of Dry Head Creek does not equal 60 miner's inches of water, during which periods of the irrigation seasons, except as hereinafter set forth, plaintiffs have used all of the waters flowing in said south fork of Dry Head Creek for the purposes of irrigating their said lands. That at no time since the year [7] 1902 has there been sufficient water in Dry Head Creek to successfully irrigate the irrigable portions of the above-described lands now owned by plaintiffs.

XII.

That the lands of the defendants and the points of diversion of said defendants from the south fork of Dry Head Creek are all located outside of and off the Crow Indian Reservation in the State of Montana.

XIII.

That during the irrigation seasons of 1944 and 1945, at a point or points about five or more miles south of the plaintiffs' said lands, the defendants have unlawfully and wrongfully diverted all of the waters flowing in said south fork of Dry Head Creek, to plaintiffs' damage, and that they threaten and intend to so divert all of said waters during the coming irrigation season.

XIV.

That whatever rights, if any, said defendants have to the use of the waters of the south fork of Dry Head Creek are much later in time, subsequent and inferior to the rights of plaintiffs established and created by the Crow Treaty of May 7, 1868.

XV.

That plaintiffs intend to irrigate approximately one hundred fifty (150) acres planted to alfalfa hay, orchard and garden on the above-described lands during the coming farming and irrigation season; that during the months of May, June, July, August, and September of this year, plaintiffs will require all of the waters flowing in the south fork of Dry Head Creek to irrigate their said crops. [8]

XVI.

That a cloud upon plaintiffs' title or right to the use of the waters of the south fork of Dry Head Creek exists by reason of the said diversions of the defendants and each of them. That unless the defendants are restrained from diverting the waters of the south fork of Dry Head Creek as aforesaid a

cloud upon plaintiffs' title or right to the use of the waters of the south fork of Dry Head Creek will continue to exist and plaintiffs will suffer great and irreparable damage.

Wherefore, said plaintiffs pray that a preliminary injunction shall issue after due notice of this application therefor and that defendants be ordered, on a day fixed, to show cause why said preliminary injunction should not be granted, enjoining and restraining the defendants, and each of them, their servants, agents and employees from doing the acts complained of; and that upon the final determination of this suit, a permanent injunction issue, enjoining and restraining the said defendants, their agents, servants, and employees, and all persons claiming under, through, or by them, from maintaining any dams or ditches in the south fork of Dry Head Creek and from diverting by means of said dams and ditches or in any other manner any of the waters from the south fork of Dry Head Creek; that plaintiffs have and recover their costs and disbursements herein expended and that said plaintiffs have such other and further relief as shall appear to the Court meet and proper.

SIMMONS & ALLAN.

/s/ By KENNETH R. L. SIMMONS,
Attorneys for Plaintiffs. [9]

State of Montana,
County of Yellowstone—ss.

B. M. Phelps, being first duly sworn on his oath,

deposes and says that he is one of the plaintiffs named in the foregoing complaint; that he has read the said complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

B. M. PHELPS.

Subscribed and sworn to before me this 9th day of February, 1946.

[Seal] KENNETH R. L. SIMMONS,
Notary Public for the State of Montana, Residing
at Billings, Montana.

My Commission expires April 19, 1947. [10]

EXHIBIT "A"

Treaty With the Crows, 1868

Articles of a treaty made and concluded at Fort Laramie, Dakota Territory, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Crow Indians, they being duly authorized to act in the premises.

Article 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites or among other people, subject to the authority of

the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished, according to its laws; and in case they refuse willfully so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating, or because of his violating, the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

Article 2. The United States agrees that the following district of country, to-wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th Meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid. [11]

Article 3. The United States agrees, at its own proper expense, to construct on the south side of the Yellowstone, near Otter Creek, a warehouse or

store-room for the use of the agent in storing goods belonging to the Indians, to cost not exceeding twenty-five hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said reservation, near the other building herein authorized, a good steam circular saw-mill, with a grist-mill and shingle-machine attached, the same to cost not exceeding eight thousand dollars.

Article 4. The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

Article 5. The United States agrees that the agent for said Indians shall, in the future, make his home at the agency-building; that he shall reside among them, and keep an office open at all

times for the purpose of prompt and diligent inquiry into such matters of complaint, by and against the Indians, as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

Article 6. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for the purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow land book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for [12] protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

Article 7. In order to insure the civilization of the tribe entering into this treaty, the necessity of education is admitted, especially by such of them as are, or may be, settled on said agricultural reservation; and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children, between said ages, who can be induced or compelled to attend school, a house shall

be provided, and a teacher, competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

Article 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seed and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seed and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

Article 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house, on the reservation herein provided for, on the first day of September of each year for thirty years, the following articles, to-wit:

For each male person, over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woolen socks.

For each female, over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent, each year, to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And, in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian [13] roaming, and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as, from time to time, the condition and necessities of the Indians may indicate to be proper. And if, at any time within the ten years, it shall appear that the amount of money needed for clothing, under this article, can be appropriated to better uses for the tribe herein named, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn

or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery; and it is expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation, and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated with them, who shall remove to the reservation herein described, and commence farming, one good American cow and one good, well-broken pair of American oxen, within sixty days after such lodge or family shall have so settled upon said reservation.

Article 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

Article 11. No treaty for the cession of any por-

tion of the reservation herein described, which may be held in common, shall be of any force or validity as against the said Indians unless executed and signed by, at least, a majority of all the adult male Indians occupying or interested in the same, and no cession by the tribe shall be understood or construed in such a manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him as provided in Article 6 of this treaty.

Article 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent, may grow the most valuable crops for the respective year.

W. T. SHERMAN,
Lieutenant-General.

WM. S. HARNEY,
Brevet-Major-General and
Peace Commissioner.

ALFRED H. TERRY,
Brevet Major-General.

C. C. AUGUR,
Brevet Major-General.

JOHN B. SANBORN,
S. F. TAPPAN.

ASHTON S. H. WHITE,
Secretary.

- [Seal] CHE-RA-PEE-ISH-KA-TW,
Pretty Bull, his x mark.
- [Seal] CHAT-STA-HE,
Wolf Bow, his x mark.
- [Seal] AH-BE-CHE-SE,
Mountain Tail, his x mark.
- [Seal] KAM-NE-BUT-SA,
Black Foot, his x mark.
- [Seal] DE-SAL-ZE-CHO-SE,
White Horse, his x mark.
- [Seal] CHIN-KA-SHE-ARACHE,
Poor Elk, his x mark.
- [Seal] E-S-WOOR,
Shot in the Jaw, his x mark.
- [Seal] E-SHA-CHOSE,
White Forehead, his x mark.
- [Seal] —ROO-KA,
Pounded Meat, his x mark.
- [Seal] DE-KA-KE-UP-SE,
Bird in the Neck, his x mark.
- [Seal] ME-NA-CHE,
The Swan, his x mark.

Attest:

GEORGE B. WILLIS,
Phonographer.
JOHN D. HOWLAND,
ALEX GARDNER,
DAVID KNOX,
CHAS. FREEMAN,
JAS. C. O'CONNOR.

[Endorsed]: Filed Feb. 27, 1946. [15]

[Title of District Court and Cause.]

DEFENDANTS' CONSOLIDATED MOTIONS
TO DISMISS AMENDED COMPLAINT,
FOR MORE DEFINITE STATEMENT,
ETC.

The defendants separately and without waiver by any one motion herein made of any other such motion now respectfully move the court pursuant to Rule 15 (a) and Rule 12 (a), (b), (e) and (g), Federal Rules of Civil Procedure, as follows:

I.

To dismiss the plaintiffs' amended complaint and action for the reason that the said amended complaint fails to state a claim upon which relief can be granted.

II.

To dismiss the plaintiffs' amended complaint and action for the reason that it appears from the face of the amended complaint the court has no jurisdiction over the subject matter of the action.

III.

To dismiss the plaintiffs' amended complaint and action for the reason that the court is without jurisdiction, because the matter in controversy does not arise under (a) the Constitution of the United States, or (b) the laws of the United States, or (c) a treaty made under their authority. [17]

IV.

To dismiss the plaintiffs' amended complaint and action for the reason that the court is without juris-

diction, because the matter in controversy does not exceed \$3,000.00, exclusive of interest and costs, as an inspection of the allegations of the amended complaint shows, and more particularly as appears otherwise in that

(a) The plaintiffs cannot recover herein any amount in excess of \$3,000.00, exclusive of interest and costs, nor any other amount at all; and

(b) The value of the right to the use of the waters, during the annual irrigation seasons, of the south fork of Dry Head Creek, delivered upon the plaintiffs' lands and into their ditch or ditches, without interference by the defendants, which is the matter in controversy herein, does not exceed the sum of \$3,000.00, exclusive of interest and costs, but is to the contrary of a value not greater than \$50.00, or thereabouts; and

(c) The value of the plaintiffs' right to the use, during the months of May, June, July, August and September of each year, of the water in the south fork of Dry Head Creek, delivered upon the plaintiffs' lands and into their ditch or ditches, without interference, diversion or prior use by the defendants, which as the plaintiffs allege does not equal 60 miner's inches of water, and which is the matter in controversy herein, does not exceed the sum of \$3,000.00, exclusive of interest and costs, but is to the contrary of a value not greater than \$500.00, or thereabouts; and

(d) The value of the plaintiffs' right to the use of the waters in the south fork of Dry Head Creek during the annual irrigation seasons, as claimed by

them in their complaint, without interference by the defendants, is because [18] of the nature of the flow of the south fork aforesaid, of the creek bed, and of other attendant physical factors in nowise lessened or diminished by the use of the plaintiffs and their diversion of the waters in the south fork aforesaid as heretofore has long been customary and usual. Accordingly the matter in controversy is of inconsequential value, does not exceed the sum of \$3,000.00, exclusive of interest and costs, and is to the contrary of a value not greater than \$500.00, or thereabouts; and

(e) The use and the diversion by the defendants of the waters of the south fork of Dry Head Creek, as has heretofore been usual and customary during the annual irrigation seasons, and as is alleged in the plaintiffs' amended complaint, does not appreciably diminish any right of the plaintiffs to the use of the flow of water in the south fork of Dry Head Creek at any time during the annual irrigation seasons aforesaid or otherwise. Accordingly, the diminution in value of the plaintiffs' rights as they claim because of any use or prior diversion by the plaintiffs does not exceed the sum of \$3,000.00, exclusive of interest and costs, and is to the contrary not more than \$500.00, or thereabouts, and

(f) The plaintiffs have not heretofore lost, and will not hereafter lose, any sum, whatsoever, or be prejudiced in any sum of money or amount at all because of the use or diversion of any waters of the south fork of Dry Head Creek by the defendants at any time.

IV.

To dismiss the plaintiffs' amended complaint and action for the reason that it appears from the face of the amended complaint this action is not prosecuted [19] in the name of the real party in interest, viz., the United States of America, the trustee holding the legal title to the lands and waters in the amended complaint mentioned, which are involved in this action as more particularly alleged in paragraph VIII of the amended complaint.

V.

To dismiss the plaintiffs' amended complaint and action for the reason that it appears from the face of the amended complaint the United States of America is a necessary and indispensable party plaintiff in the premises to bring and maintain any action on the part of the plaintiffs, or either of them.

(a) Because any rights of the plaintiffs in the premises under the treaty of May 7, 1868, to which the amended complaint particularly refers, are held and owned by the United States of America, because of the reservation made to it under the treaty aforesaid as the trustee of the Crow Tribe or Nation of Indians, and

(b) Because its legal title aforesaid the United States has not transferred to the plaintiffs, or either of them, but now appears from the amended complaint yet to own and hold in trust for the plaintiffs as its beneficiaries; and

(c) Because notwithstanding these facts the

United States has not consented to sue or to be sued in this action, and may not without its consent be here sued or impleaded.

VI.

Or, in the alternative, to direct the plaintiffs to file a more definite statement or a bill of particulars of the following matters, to which the amended complaint herein refers, to-wit: [20]

1. The date and the manner of the appropriation made by Charles M. Phelps, as in paragraph IX of the amended complaint averred, of the waters of the South Fork of Dry Head Creek.

2. The quantity of water originally appropriated by Charles M. Phelps and the lands upon which the waters so appropriated were originally used for irrigation or other beneficial uses, as alleged in paragraph IX of the amended complaint.

3. The size and location of the ditch, ditches, or other irrigation works, by which Charles M. Phelps diverted water for irrigation and other beneficial uses, as alleged in paragraph IX of the amended complaint.

4. The manner of the plaintiffs' succession to, and ownership of, any appropriation made by Charles M. Phelps of the waters of the South Fork of Dry Head Creek, as alleged particularly in paragraph IX of the amended complaint, and whether the plaintiffs' ownership as so alleged is (a) by a legal title, or (b) by an equitable title.

5. The area of the lands of the plaintiffs originally irrigated by Charles M. Phelps by his initial appropriation of the waters of the South Fork of

Dry Head Creek, as in paragraph IX of the amended complaint alleged.

6. The date of the construction of the dam in the South Fork of Dry Head Creek and of the irrigation system, to which reference is made in paragraph X of the amended complaint.

7. The location and the area of (a) the irrigable portions of the plaintiffs' lands, and (b) of their lands actually heretofore irrigated with the waters of the South Fork of Dry Head Creek, as alleged in paragraph XI of the amended complaint.

8. The date and the priority claimed by the plaintiffs in the use of the waters of the South Fork of Dry Head Creek, to which particular reference is made in paragraph XIV of the amended complaint.

These Motions are one and all made upon the plaintiffs' amended complaint herein, including as a part thereof the exhibit thereunto annexed, marked "Exhibit A," and thereof made a part, and upon all the files, minute entries, papers and proceedings herein.

Dated at Billings, Montana, this 29th day of May, 1946.

H. C. CRIPPEN,

Attorney for Defendants.

ROCKWOOD BROWN &

HORACE S. DAVIS,

FRANKLIN S. LONGAN.

By HORACE S. DAVIS,

Attorneys for Defendants.

Personal service of the within and foregoing Defendants' Consolidated Motions to Dismiss Amended Complaint, for more Definite Statement, etc., made and admitted, and the receipt of a copy thereof acknowledged this 29th day of May, 1946.

SIMMONS & ALLAN,
By ROY F. ALLAN,
Attorneys for Plaintiff.

[Endorsed]: Filed May 30, 1946. [22]

[Title of District Court and Cause.]

ORDER ALLOWING TIME TO FILE
SUPPLEMENTAL BRIEF

This cause was duly called for hearing this day on the consolidated motions to dismiss the amended complaint, said motions having been filed on May 30, 1946, Mr. Kenneth R. L. Simmons being present and appearing for the plaintiffs, and Mr. Horace S. Davis being present and appearing for the defendants.

Thereupon Court ordered said motions submitted on plaintiff's brief heretofore filed, counsel for plaintiff stating that the legal questions in the motions are covered in said brief, and further ordered that defendants be and are granted ten days to file a supplemental brief if so advised, the said defendants having heretofore filed a brief, but which brief may not cover the questions raised in the new motions, the said above-mentioned briefs having been

filed on the consolidated motions directed to the original complaint herein.

Entered in open Court at Billings, Montana, October 28, 1946.

H. H. WALKER,
Clerk. [24]

In the District Court of the United States, in and
for the District of Montana, Billings Division

Civil Action No. 775

B. M. PHELPS and ALICE E. PHELPS,
Plaintiffs,

vs.

FLOYD HANSON, EZRA HANSON, SARA
HANSON and EVA M. HAMMOND,
Defendants.

DECISION

The above-entitled action is before the court at this time on defendants' consolidated motions to dismiss amended complaint, for more definite statement, etc.

This is an action to quiet title to prior rights claimed by plaintiffs to the waters of the south fork of Dry Head Creek; that the lands and water rights owned and possessed by plaintiffs are located within the Crow Indian Reservation in the state and district of Montana, and plaintiffs herein seek injunctive and other relief.

The complaint was filed February 27th, 1946, thereafter defendants filed their consolidated motions to dismiss, for more definite statement, etc., followed by their brief, and a reply brief was filed by plaintiffs on May 9th, 1946. Before these briefs were considered by the court, plaintiffs, on May 22nd, 1946, amended their complaint. Counsel for defendants thereafter filed their consolidated motions to dismiss the amended complaint, for more definite statement, etc., and both sides were granted time to revise their briefs. On November 7th, 1946, counsel for defendants submitted their revised brief, and counsel for plaintiffs announced that they would stand on their original brief of May 9th, 1946. Thereafter the motions and briefs were referred to the court for consideration and decision. [26]

The court has devoted considerable time to the complaint and many of the decisions cited in both briefs and has found it very difficult to determine how the present action can be maintained in the federal court. An effort has been made to find jurisdictional grounds in the Powers case (16 Fed. (2) 155) and in the Winters case (207 U.S. 564), in which the United States was plaintiff in both cases, but has been unable to do so in view of the pertinent and apparently controlling decisions that appear to be more directly in point. If the court should accept the reasoning of the plaintiffs and attempt to force a trial on the merits, it seems certain that it would result in an expenditure of time and effort to no purpose, and that the objections in-

terposed to the complaint in the final outcome would have to be sustained.

From a perusal of the decisions in point, it does not appear that this action can be based upon the Crow Treaty of 1868, or that there are any other laws or treaties of the United States to support jurisdiction in the federal court, nor can it be predicated upon the constitutional provisions cited. The courts uniformly hold that a mere assertion of ownership of lands and water rights by a title derived from the United States, or under any law or treaty thereof, is not of itself sufficient to confer jurisdiction in federal courts. In this case for jurisdictional authority the plaintiffs refer back to the treaty of 1868, wherein it is alleged there was reserved to said Indians and their successors in interest for irrigation and other beneficial uses upon the reservation lands, and which were therein exempted from appropriation under territorial or state laws or otherwise, all the waters of reservation streams, which would include the waters of the south fork of Dry Head Creek for the irrigation of plaintiffs' lands. Counsel for [27] defendants admit that the foregoing allegations are the closest to a jurisdictional averment contained in the complaint, but deny its sufficiency to confer jurisdiction.

One of the latest cases having some bearing on the issue of jurisdiction in this case is found in the opinion of Mr. Justice Black in *Bell v. Hood*, 327 U.S. 678, with a dissenting opinion by Mr. Chief Justice Stone and Mr. Justice Burton. The facts in this case are entirely different from the instant

case. In the Bell case suit was brought against the defendants, Agents of the Federal Bureau of Investigation, for violations of the Fourth and Fifth Amendments to the Constitution, wherein it was alleged that they conducted an illegal search and seizure of the plaintiffs' premises and property, and damages in excess of the sum of \$3000 were alleged: plaintiffs allege imprisonment by defendants (in violation of their Constitutional rights) and subjecting their premises to search and their possessions to seizure, in violation of their Constitutional right to be free from unreasonable searches and seizures; the defendants moved to dismiss the complaint for failure to state a cause of action for which relief could be granted and for summary judgment on the grounds that the federal agents acted within the scope of their authority as officers of the United States, and that the searches and seizures were incidental to lawful arrests and therefore valid.

A hearing on the motions took place, supported by affidavits and counter affidavits. The District Judge did not decide the motions, but on his own motion dismissed the case for want of federal jurisdiction, stating the action was not one that " * * * arises under the Constitution or laws of the United States * * * ." as required by 28 U.S.C.A., Sec. 41 (1), which was later affirmed by the Circuit Court of Appeals of the Ninth Circuit on the same grounds (150 F. (2) 96). At the same time a motion was made for a direction to the district [28] court to allow plaintiffs to amend the complaint to make it still more clearly appear that the action was

directly grounded on violations of rights alleged to stem from the Fourth and Fifth Amendments.

The court held that it was the pleaders' purpose to make violation of the above Constitutional provisions the basis of the suit; that the complaint is so drawn as to seek recovery directly under the Constitution or laws of the United States. The Court here cites *Wiley v. Sinkler*, 179 U.S. 58, 64, 65, and *Swafford v. Templeton*, 185 U.S. 487, 491, 492; in the first case cited the action was brought against election officers for damages and for the rejection of an elector's vote for a member of the House of Representatives to the United States, which was at a federal election, showing that the action was brought directly under the Constitution and laws of the United States; the principal facts in the second case are almost identical with the first case, and the court there held it to be the duty of the court to determine "whether in truth and in fact a real federal question arises on the record"; here the decision plainly shows that "the very subject matter of the controversy is Federal." And so there is presented here in the Bell case a late precedent where the very subject matter of the controversy is held to be federal, and that jurisdictional requirements have been fully satisfied, although the dissenting opinion holds directly to the contrary. But it does not appear that the facts in the three cases above set forth bear more than a slight resemblance to the facts in the present case.

Plaintiffs claim title to the lands in question and a superior right to the use of water for irrigation;

whether the title was based upon an ancient treaty of the United States with the Indians or upon a straight patent earned [29] by compliance with other laws of the United States would not of itself seem to confer jurisdiction on the United States courts to settle a dispute over a water right, if, the Bell case, *supra*, is compared with other authorities where the facts are more closely in point. Other pertinent authorities show that the mere assertion of ownership of lands and water rights under a title from the United States, either law or treaty, does not of itself confer jurisdiction on the United States District Court either under Article Three, Section II of the Constitution or Section 41, Title 28, U.S. C.A. It must appear that the action arises under, and that its determination will necessarily involve and require the construction of the laws of the United States specifically relied upon. Is there anything in the amended complaint to enable the court to say that the allegations show that the construction of a treaty or statute is necessary? It has been held that before the court can retain a cause under its jurisdiction it must appear from the record by a clear statement of facts set forth in legal and logical form that the suit is one which really and substantially involves a dispute or controversy which depends upon the construction or effect of the Constitution or some law or treaty of the United States.

In one case cited, that of *Deere v. St. Lawrence, etc., Co.*, (C.C.A. 2) 32 F (2d) 550, cited by counsel for both parties the following would apply here: "But it is asserted by appellant that his right is

founded upon the treaties of 1784 and 1796, which gave him a present right of possession. This claim denotes that the source of appellant's title is in the treaties of the United States, and such an allegation does not establish the claim that the suit arises under the laws of the United States, so as to confer original jurisdiction. In *Blackburn v. Portland*, * * * it was held, where a controversy arose in respect to lands, and where one of the parties derived title upon an Act of Congress, that [30] of itself did not present a federal question. In *Florida Cent. R.R. v. Bell*, * * * which was an action for ejectment, the plaintiff's claim was under the patent granted by the United States and in proceedings in the Land Department; the defendants contended that the plaintiffs were not entitled to a patent under the laws of the United States, and the defendant claimed the right under an act of Congress to erect its railroad upon the patented land. Jurisdiction was denied by the court in holding that mere assertion of title to land derived to the plaintiffs under and by virtue of a patent granted by the United States presented no question which of itself conferred jurisdiction under the Circuit Court of the United States. * * *"

It appears from statements made by plaintiffs in their brief that they claimed to hold fee title to the lands and waters involved and that the United States has no present interest in the waters of Dry Head Creek and that no rights of the United States or of any trust lands and waters are involved in this controversy. The rule established in the case of *Gustason v. California Trust Co.*, (C.C.A. 9), 73 F. (2d)

765, would seem to be precisely in point in the case under consideration, and especially in that part of the decision quoting from *Wilson v. Robinson* (C.C.A. 9), 16 F. (2d) 431, where the rule is set forth in precise terms.

The sufficiency of the allegation in respect to the amount in controversy is also challenged by counsel for the defendants who say that the unsupported statement that the matter in controversy is of value exceeding \$3000 is wholly insufficient under such circumstances and that where objections are properly raised as to the amount the plaintiffs are required to support the allegation by competent proof. Where the challenge is by motion which traverses the truth of the allegations as to amount and recited facts dehors the complaint it would then be necessary to inquire as to [31] the court's jurisdiction before considering the merits of the case, and it is shown that upon such inquiry being made the complainant has the burden of proof. That in the case cited the respondent having failed to support the allegations as to amount in controversy the district court should have dismissed the bill. This seems to be the gist of the decision in respect to amount in controversy in *KVOS, Inc., v. Associated Press*, 299 U.S. 269, 81 L.Ed. 183, 57 S. Ct. Rep. 197. And the court also held that such a mere formal allegation is sufficient, unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint. Mr.

Chief Justice Hughes held in *McNutt v. General Motors Corp.*, 298 U.S. 178, among other pertinent things, that "If this allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." In that case an injunction was sought upon the ground that the matter in controversy arose under the Constitution of the United States but it did not appear that the value involved exceeded \$3000, exclusive of interest and costs. In other words, when the value of the matter in controversy, exclusive of interest and costs, is challenged, it must be affirmatively shown to exceed \$3000. This has not been done in this case as appears conclusively from the authorities relied upon.

The court has considered many cases cited by counsel on both sides in connection with the allegations of the amended complaint, and the arguments of counsel, and is now of the opinion that the United States District Court is without jurisdiction to hear and determine the issues involved, as set forth in the amended complaint in this action, and, accordingly, the motion to dismiss is hereby sustained.

Feb. 8, 1947.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Feb. 8, 1947. [32]

[Title of District Court and Cause.]

ORDER DISMISSING ACTION

The defendants' consolidated motions to dismiss the amended complaint of the plaintiffs, for a more definite statement, etc., having been previously argued by the counsel upon written briefs; and the motion of the defendants having been by the court heretofore, to-wit, on February 8, 1947, sustained; and good cause therefore being made to appear,

Now, Therefore, the amended complaint of the plaintiffs herein and their cause of action is, and they are each and both hereby dismissed.

Done and dated this 11th day of February, 1947.

By the Court:

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and Entered Feb. 11, 1947.

[Title of District Court and Cause.]

NOTICE

To: B. M. Phelps and Alice E. Phelps, plaintiffs herein, and to Simmons & Allan, Esqs., their attorneys:

You, and each of you, will take notice hereby that heretofore, to-wit, on February 11, 1947, the court by its order of date that day regularly dismissed the above-entitled action and the complaint of the plaintiffs therein as more certainly appears from the

copy of such order hereunto annexed and hereby served upon you.

You, and each of you, will take notice accordingly.

Dated this 17th day of February, 1947.

H. C. CRIPPEN,
ROCKWOOD BROWN &
HORACE S. DAVIS,
By HORACE S. DAVIS,
Attorneys for Defendants.

[Endorsed]: Filed Feb. 18, 1947.

[Title of District Court and Cause.]

ORDER

The defendants' consolidated motions to dismiss the amended complaint of the plaintiffs, for a more definite statement, etc., having been previously argued by the counsel upon written briefs; and the motion of the defendants having been by the court heretofore, to-wit: on February 8, 1947, sustained; and good cause therefore being made to appear,

Now, Therefore, the amended complaint of the plaintiffs herein and their cause of action is, and they are each and both hereby dismissed.

Done and dated this 11th day of February, 1947.

By the Court:

CHARLES N. PRAY,
Judge.

Filed and Entered Feb. 11, 1947.

Personal service of the within and foregoing Notice made and admitted, and the receipt of a duplicate original thereof, together with a copy of the said order, acknowledged this 17th day of February, 1947.

SIMMONS & ALLAN,
By KENNETH R. L. SIMMONS,
Attorneys for Plaintiffs.

[Endorsed]: Filed Feb. 18, 1947. [37]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that B. M. Phelps and Alice E. Phelps, plaintiffs above named, do hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order made by the court and so entered herein on the 11th day of February, 1947, and the whole thereof, dismissing the amended complaint of plaintiffs herein and their cause of action.

SIMMONS & ALLAN,
By KENNETH R. L. SIMMONS,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 6, 1947. [39]

[Title of District Court and Cause.]

POINTS UPON WHICH PLAINTIFFS RELY UPON APPEAL

The plaintiffs above named, and each of them, having heretofore given notice of their appeal from

the order made and entered by the Court herein on the 11th day of February, 1947, now specify points upon which they rely upon this appeal:

I.

The trial court erred in dismissing the amended complaint of plaintiffs herein and their cause of action.

II.

The trial court erred in not overruling the defendants' consolidated motions to dismiss amended complaint for more definite statement, etc., filed in said action.

Dated this 7th day of May, 1947.

SIMMONS & ALLAN,

By KENNETH R. L. SIMMONS,

Attorneys for Plaintiffs. [41]

Personal service of the within and foregoing points upon which plaintiffs rely upon appeal made and admitted and the receipt of a true copy thereof acknowledged this 7th day of May, 1947.

H. C. CRIPPEN,

ROCKWOOD BROWN &

HORACE S. DAVIS,

By HORACE S. DAVIS,

Attorneys for Defendants.

[Endorsed]: Filed May 8, 1947. [42]

[Title of District Court and Cause.]

PRAECIPE FOR DESIGNATION OF PORTIONS OF RECORD DESIRED ON APPEAL

To: The Clerk of the District Court of the United States in and for the District of Montana:

Please Prepare a transcript of the record for the purpose of the appeal of plaintiffs to the United States Circuit Court of Appeals for the Ninth Circuit from the order made and entered in the above entitled cause on the 11th day of February, 1947, dismissing the amended complaint of the plaintiffs therein and their cause of action, and include therein the following:

1. The complaint of plaintiffs as amended by order of this Court of May 22, 1946.

2. Defendants' consolidated motions to dismiss amended complaint, for more definite statement, etc.

3. Decision of the Court, filed February 8, 1947.

4. Final order of the Court dismissing amended complaint of the plaintiffs and their cause of action, filed and entered February 11, 1947. [44]

5. Notice directed to plaintiffs and their attorneys, dated February 17, 1947, by attorneys for defendants of order entered by the court dismissing the amended complaint of the plaintiffs and their cause of action.

6. This praecipe for designation of portions of record on appeal with acknowledgment of service thereon.

Said transcript is to be prepared and fully certified by you as required by law and the rules of the above-entitled court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit. You should state in such certificate that there has been deposited with you as clerk of the above-entitled court a cash cost bond on appeal in the amount of Two Hundred Fifty Dollars (\$250.00).

It is the desire of the plaintiffs or appellants that the Clerk of the Circuit Court of Appeals for the Ninth Circuit have printed the entire transcript of the record and so certified by you.

Dated this 7th day of May, 1947.

SIMMONS & ALLAN,
By KENNETH R. L. SIMMONS,
Attorneys for Plaintiffs.

Personal service of the within and foregoing praecipe made and admitted and the receipt of a true copy thereof acknowledged this 7th day of May, 1947.

H. C. CRIPPEN,
ROCKWOOD BROWN &
HORACE S. DAVIS,
By HORACE S. DAVIS,
Attorneys for Defendants.

[Endorsed]: Filed May 8, 1947. [45]

[Title of District Court and Cause.]

MAILING NOTICE

Mailed copy Notice of Appeal to H. C. Crippen, Billings, Montana, and to Messrs. Rockwood Brown and Horace S. Davis and Franklin S. Longan, at Billings, Montana, Attorneys for Defendants.

May 10, 1947. [47]

Thereafter, on May 10, 1947, the plaintiffs and appellants herein posted a Cash Cost Bond on Appeal herein, in the sum of Two Hundred Fifty Dollars, (\$250.00), and said sum, as such Cash Cost Bond on Appeal, was deposited in the Registry of this Court pending the outcome of the appeal herein, and is now on deposit in the Registry of this Court.

[Title of District Court and Cause.]

DESIGNATION BY APPELLEES OF ADDITIONAL PORTIONS OF RECORD, ETC., TO BE INCLUDED IN TRANSCRIPT OF RECORD

To: The Clerk of the District Court of the United States in and for the District of Montana:

Pursuant to Rule 75(a), Federal Rules of Civil Procedure, the appellants and defendants in this cause hereby designate the following additional portions of the record, proceedings, and evidence to be included in the transcript of the record on the appeal of the appellants and plaintiffs aforesaid to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order of this court made on February 11, 1947, dismissing the plaintiffs' and appellants' amended complaint and their cause of action herein, to-wit:

1. The proceedings had in open court at Billings, Montana, on or about October 28, 1946, upon the submission of the defendants' consolidated motions to dismiss amended complaint, for more definite statement, etc., as such proceedings appear upon the minutes of the court and from the official court reporter's notes.

2. This designation by the defendants and appellees of the proceedings aforesaid to be included in the transcript of the record on appeal.

Dated this 14th day of May, 1947. [50]

H. C. CRIPPEN,
415 Electric Building,
Billings, Montana.

Attorney for Defendants and
Appellees.

HORACE S. DAVIS,
Suite 4, The Montana Nat. Bk.
Bldg., Billings, Montana.
Attorney for Defendants and
Appellees.

ROCKWOOD BROWN &
HORACE S. DAVIS,
MARION B. PORTER and
NORMAN HANSON,
By HORACE S. DAVIS,
Suite 4, The Montana Nat. Bk.
Bldg., Billings, Montana.
Attorneys for Defendants and
Appellees.

Personal service of the within and foregoing Designation by Appellees of Additional Portions of Record, Etc., to be included in Transcript of Record made and admitted, and the receipt of a copy thereof acknowledged, this 14th day of May, 1947.

SIMMONS & ALLAN,
By KENNETH R. L. SIMMONS,
Attorneys for Plaintiffs and
Appellants.

[Endorsed]: Filed May 15, 1947.

In the District Court of the United States in and
for the District of Montana, Billings Division

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of pages, numbered consecutively from 1 to 52, inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 775, B. M. Phelps and Alice E. Phelps vs. Floyd Hanson, Ezra Hanson, Sara Hanson and Eva M. Hammond, designated by the parties as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Ten and 20/100ths Dollars, and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 27th day of May, A. D., 1947.

[Seal] H. H. WALKER,
Clerk.

By /s/ C. G. KEGEL,
Deputy.

[Endorsed]: No. 11641. United States Circuit Court of Appeals for the Ninth Circuit. B. M. Phelps and Alice E. Phelps, Appellants, vs. Floyd Hanson, Ezra Hanson, Sara Hanson and Eva M. Hammond, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed June 2, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 11641

B. M. PHELPS and ALICE E. PHELPS,
Appellants,
vs.

FLOYD HANSON, EZRA HANSON, SARA
HANSON and EVA M. HAMMOND,
Appellees.

POINTS UPON WHICH APPELLANTS RELY
UPON APPEAL AND DESIGNATION OF
RECORD TO BE PRINTED ON APPEAL

In behalf of their appeal from the order made
and entered in the United States District Court for

the District of Montana on February 11, 1947, and the whole thereof, dismissing the amended complaint of plaintiffs therein and their cause of action, appellants hereby formally adopt the statement of points relied upon appeal filed in the United States District Court for consideration by the United States Circuit Court of Appeals for the Ninth Circuit. In behalf of said appeal the appellants, and each of them, further rely upon and hereby designate the entire transcript of record to be printed under Sub-division 6 of Rule 19 (C.C.A. 9), as was transmitted by the Clerk of the United States District Court for the District of Montana, to this court on the 29th day of May, 1947.

SIMMONS & ALLAN,
/s/ By KENNETH R. L. SIMMONS,
Attorneys for Appellants.

Personal service of the within and foregoing points upon which appellants rely upon appeal and designation of record to be printed on appeal made and the receipt of a true copy thereof acknowledged this 2nd day of June, 1947.

H. C. CRIPPEN,
ROCKWOOD BROWN &
HORACE S. DAVIS,
/s/ By HORACE S. DAVIS,
Attorneys for Appellees.

[Endorsed]: Filed June 5, 1947.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

B. M. PHELPS and ALICE E. PHELPS, Appellants,
v.

FLOYD HANSON, EZRA HANSON, SARA HANSON
and EVA M. HAMMOND, Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF
MONTANA, BILLINGS DIVISION

Appellants' Opening Brief

KENNETH R. L. SIMMONS,
ROY F. ALLAN,

Address: 221 Fratt Bldg.,
Billings, Montana,

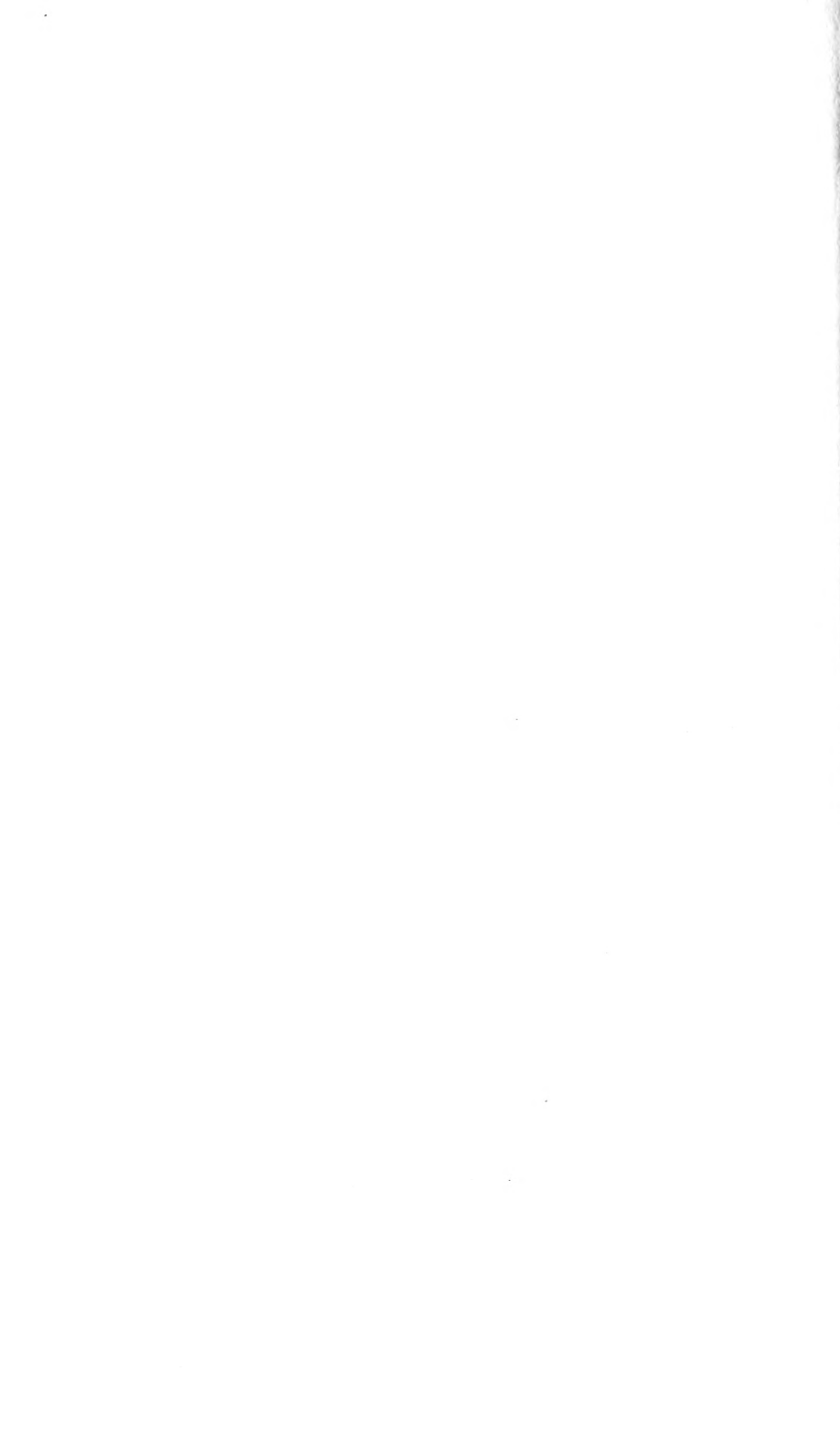
Attorneys for Appellants.

FILED

AUG 22 1947

AUL P. O'BRIEN,

CLERK



No. 11641

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

B. M. PHELPS and ALICE E. PHELPS, Appellants,

v.

FLOYD HANSON, EZRA HANSON, SARA HANSON
and EVA M. HAMMOND, Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF
MONTANA, BILLINGS DIVISION

Appellants' Opening Brief

KENNETH R. L. SIMMONS,

ROY F. ALLAN,

Address: 221 Fratt Bldg.,
Billings, Montana,

Attorneys for Appellants.

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No. 11641

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

B. M. PHELPS and ALICE E. PHELPS, Appellants,

v.

FLOYD HANSON, EZRA HANSON, SARA HANSON
and EVA M. HAMMOND, Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF
MONTANA, BILLINGS DIVISION

Appellants' Opening Brief

**Statement of Pleadings and Facts Disclosing Basis Upon
Which It Is Contended That the District Court Had
Jurisdiction and That This Court Now Has Jurisdic-
tion Upon Appeal to Review the Order or Final Judg-
ment Rendered.**

A.

The major issue in this case is whether or not the United States District Court for the District of Montana has jurisdiction to hear the case. The United States District Court

for the District of Montana based its order (R. 38) dismissing the amended complaint of the plaintiffs upon its memorandum decision (R. 29) which set forth that the United States District Court was without jurisdiction to hear and determine the issues involved for the reasons that the matter in controversy did not arise under the constitution and laws of the United States and treaties under their authority (R. 29-36) and that allegations contained in the amended complaint in respect to the amount in controversy were not sufficient to show that the matter in controversy is of the value exceeding Three Thousand Dollars.

In the event the United States District Court for the District of Montana was in error as contended by the appellants and the United States District Court had jurisdiction, clearly this Court has jurisdiction to reverse the United States District Court in the controversy.

B.

Appellants contend that the United States District Court for the District of Montana had jurisdiction under the following provisions of **Section 41, Sub-Division 1, (Title 28)**

U.S.C.A.:—

“Section 41. (Judicial Code, section 24, amended). Original jurisdiction. The district courts shall have original jurisdiction as follows:

“(1); civil suits at common law or in equity. First. Of all suits of a civil nature, at common law or in equity; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b)”

C.

Appellants contend that the amended complaint (R. 2-11) and Exhibit “A”, the treaty of May 7, 1868 (R. 11-22) between the Crow Tribe of Indians and the United States, which is by reference made a part of the complaint, in their entirety confer jurisdiction upon the United States District Court for the District of Montana in this case.

STATEMENT OF THE CASE

Appellants instituted this action in the United States District Court for the District of Montana to enjoin the appellees herein from diverting any of the waters from the south fork of Dry Head Creek (R. 10) which stream has its source in the Pryor Mountains (R. 4) in Carbon County, Montana, off the Crow Indian Reservation, and flows thence in a northerly direction upon and across the lands of the appellees, and thence on the Crow Indian Reservation upon and across the lands of the appellants (R. 4, 5), which lands of the appellants were at the time of the Crow treaty of May 7, 1868, and still are, located within the boundaries of the Crow Indian Reservation as it now exists (R. 6). Appellants allege that by virtue of the treaty of May 7, 1868, a certain tract of land was set aside in the then Territory, but now state of Montana for the use of the Crow Indians, which lands are described in Paragraph V of the amended complaint (R. 5, 6), and that the lands of the appellants are located within the boundaries of the Crow Indian Reservation (R. 6), but that the lands of the appellees and the points of diversion made by them of the waters of Dry Head Creek are located outside of and off the Crow In-

dian Reservation in the state of Montana (R. 8). Appellants also allege in their amended complaint that their lands are arid and dry (R. 8) and that during the months of May, June and July of each year the flow of water in Dry Head Creek is not sufficient to successfully irrigate the irrigable portions of the lands owned by appellants (R. 8) as designated in the amended complaint (R. 3, 4). That it is the desire of the appellants to irrigate one hundred and fifty (150) acres of their lands and that their lands will require all of the water flowing in the south fork of Dry Head Creek to successfully irrigate their crops. (R. 8, 9.)

Appellants also allege that defendants or appellees have unlawfully and wrongfully diverted all of the waters flowing in the south fork of Dry Head Creek to appellants' or plaintiffs' damage, and that they threaten to continue and intend to divert all of said waters during the coming irrigation seasons (R. 9).

It is next alleged in Paragraph XIV of the amended complaint (R. 9) that whatever rights, if any, the said defendants or appellees have to the use of the waters of south fork of Dry Head Creek are much later in time, subsequent and inferior to the rights of plaintiffs or appellants established and created by the Crow Treaty of May 7, 1868 (R. 9).

The rights acquired by plaintiffs or appellants to the waters of Dry Head Creek under the Crow treaty of May 7, 1868, are described as follows in the allegation contained in paragraph VIII of the amended complaint (R. 7):

“VIII. That by the establishment of the Crow In-

dian Reservation, on May 7, 1868, the United States became the trustee of the Crow Tribe of Indians, holding legal title to all of the lands and waters of the Crow Indian Reservation and at that time, on May 7, 1868, there was then reserved to said Indians and their successors in interest for irrigation and other beneficial uses upon the lands of said reservation, and exempted from appropriation under territorial or state laws or otherwise, all of the waters of reservation streams necessary for the successful irrigation of irrigable lands upon said reservation, including all of the waters of the south fork of Dry Head Creek, which are necessary for the successful irrigation of plaintiffs' lands herein described."

It is also alleged in paragraph XVI of the amended complaint that a cloud exists upon plaintiffs' or appellants' title or right to the use of the waters of south fork of Dry Head Creek, by reason of the diversions of the defendants or appellants of these waters (R. 9).

There next appears the usual prayer for a preliminary and permanent injunction. (R. 10.)

To the amended complaint of the plaintiffs or appellants the defendants or appellees interposed consolidated motions to dismiss on six main grounds (R. 22-27), three of which directly concern this court as to the question of its jurisdiction, which are contained in the following paragraphs of defendants' consolidated motions:

"III. To dismiss the plaintiffs' amended complaint and action for the reason that the court is without jurisdiction, because the matter in controversy does not arise under (a) the Constitution of the United States, or (b) the laws of the United States, or (c) a treaty made under their authority."

"IV. To dismiss the plaintiffs' amended complaint and action for the reason that the court is without jurisdiction, because the matter in controversy does not

exceed \$3,000.00, exclusive of interest and costs, as an inspection of the allegations of the amended complaint shows, ”

“V. To dismiss the plaintiffs’ amended complaint and action for the reason that it appears from the face of the amended complaint the United States of America is a necessary and indispensable party plaintiff in the premises to bring and maintain any action on the part of the plaintiffs, or either of them. . . .”

The other points raised in defendants’ consolidated motions are immaterial as affects the jurisdiction of the United States District Court for the District of Montana. They deal with demands for a definite statement or bill of particulars and do not involve the question of jurisdiction.

Following the presentation of briefs (R. 28, 29), the United States District Court rendered its decision holding that in its opinion the Court had no jurisdiction to hear the controversy for the reasons that the matter in controversy was not one which arose under the constitution or laws of the United States or treaties made under their authority, and that the allegations in the amended complaint were insufficient to show that the value of the matter in controversy exceed \$3000.00 (R. 29-37). An order or final judgment dismissing the amended complaint of the plaintiffs and their cause of action was then filed and entered on February 11, 1947 (R. 38). An appeal was therefrom taken by the plaintiffs or appellants to this Court (R. 38-40) and the praecipe for designation of record duly filed (R. 42). The appellees designated an additional portion of record showing the proceedings had in connection with the filing of briefs (R. 45). The appellants adopted the points upon which they rely for appeal (R. 48, 49) filed in the United

States District Court for consideration by the United States Circuit Court of Appeals for the Ninth Circuit (R. 40).

SPECIFICATION OF ERRORS RELIED UPON

I.

The trial court erred in dismissing the amended complaint of plaintiffs herein and their cause of action.

II.

The trial court erred in not overruling the defendants' consolidated motions to dismiss amended complaint, for more definite statement, etc., filed in said action.

ARGUMENT

The matter in controversy arises under the Crow treaty of May 7, 1868 (15 Stat. 649).

It is our contention that the United States Courts have jurisdiction of this controversy under authority of the Judicial Code Section 24, as amended, Title 28 U. S. C. A., Sec. 41 (1)(a), which provides in part:

“Section 41. (Judicial Code, Section 24 amended.)
Original jurisdiction. The District Courts shall have original jurisdiction as follows:

(1); **Civil suits at common law or in equity.** First of all suits of a civil nature, at common law or in equity. . . .; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3000, and (a) arises under the constitution or laws of the United States, or Treaties made, or which shall be made under their authority. . . .”

The Supreme Court of the United States in the case of *Smith v. Kansas City Title and Trust Co.*, 41 S. Ct. 243; 255 U. S. 180, 65 L. Ed. 577, in construing the provisions of Section 41 (1) Title 28 U. S. C. A., stated (p. 585):

“The general rule is that where it appears from the

bill or statement of plaintiff that the **right to relief** depends upon the construction or application of the constitution or laws of the United States, and that such Federal claim is not merely colorable, and rests upon reasonable foundation, the district court has jurisdiction under this provision. (**Judicial Code Sec. 24**), (Emphasis supplied.) At an early date considering the grant of constitutional power to confer jurisdiction upon the Federal Courts, Chief Justice Marshall said: 'A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends upon the construction of either.' *Cohen v. Virginia*, 6 Wheat. 264, 379, 5 L. Ed. 257, 285; and again, when 'the right or title set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction.' *Osborn v. Bank of the United States*, 9 Wheat, 738, 822, 6 L. Ed., 204, 224. "These definitions were quoted and approved in *Patton v. Brady*, 184 U. S. 608, 611, 46 L. Ed. 713, 715 22 S. Ct. 493, citing *Little York Gold-Washing and Water Co. v. Keyes* 96 U. S. 199, 201, 24 L. Ed. 656, 658; *Tennessee v. Davis* 100 U. S. 257, 25 L. Ed. 648; *White v. Greenhow* 114 U. S. 307, 29 L. Ed. 199, 5 S. Ct., 923, 962; *New Orleans, M. & T. R. Co. v. Mississippi* 102 U. S. 135, 139, 26 L. Ed. 96, 97. This characterization of a suit arising under the constitution or laws of the United States has been followed in many decisions of this and other Federal Courts."

An Indian treaty consummated, ratified and proclaimed, such as the Crow treaty of May 7, 1868 between the United States and Crow Tribe of Indians (15 Stat. 649), has the full force and effect of a law of the United States and has been so recognized by the Congress of the United States.

Title 25 U. S. C. A. Sec. 71.

United States v. Berry 4 Fed. 779:

Whatever rights plaintiffs have to the use of the waters of the south fork of Dry Head Creek are established by

and arise out of the Crow treaty of May 7, 1868, and the construction placed upon the treaty by the courts. Plaintiffs in paragraph I of their amended complaint (R. 2) allege:

“That the jurisdiction of this court attaches by virtue of the fact that the rights of plaintiffs claimed herein arise under a treaty entered into on May 7, 1868, by and between the United States of America and the Crow Tribe or Nation of Indians, which said treaty was ratified by the Senate of the United States on July 25, 1868 (15 Stat. L. 649) and proclaimed August 12, 1868 by the President of the United States, a copy of which treaty is hereto attached, marked exhibit ‘A’ and made a part hereof.”

And in paragraph VI of the complaint (R. 6) it is alleged:

“That the lands and rights to the use of the waters of the south fork of Dry Head Creek, owned and possessed by the plaintiffs, were located within the boundaries of the Crow Indian Reservation as established by the treaty of May 7, 1868, and are still located within the boundaries of the Crow Indian Reservation as diminished by further treaties between the United States and the Crow tribe of Indians. That the lands of plaintiffs herein described and their rights to the use of the waters of the south fork of Dry Head Creek are located within the State and District of Montana.”

It will be our contention in the trial of this cause that the date of priority of plaintiffs to the use of the waters of the south fork of Dry Head Creek is May 7, 1868, the date of the Crow treaty with the United States, because the lands and the water rights thereto appurtenant are located on the Crow Indian reservation.

The Supreme Court of the United States in the case of *United States v. Powers, et al*, 59 S. Ct. 344, 346, 305 U. S. 527, 83 L. Ed. 330, in construing the Crow treaty of May 7,

1868 in a case involving water rights on the Crow Indian reservation, reaffirmed the doctrine of the treaty priority date laid down by the Supreme Court of the United States in the landmark case of **Winters v. United States**, 28 S. Ct. 207, 207 U. S. 564, 52 L. Ed. 340 in the following language:

“Respondents maintain that under the treaty of 1868 waters within the reservation were reserved for the equal benefit of tribal members (**Winters v. United States** 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340) and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.

“The respondents’ claim to the extent stated is well founded.”

In the *Winters* case the Supreme Court of the United States first established the doctrine of reserved reservation waters for use on reservation lands with the date of priority as the date of the treaty setting aside the Indian reservation. In the decision in this case (28 S. Ct. 207, 212), the Court said:

“The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. **United States v. Rio Grande Dam and Irrigation Co.**, 174 U. S. 702 43 L. Ed. 1141, 19 S. Ct. 770; **United States v. Winans** 198 U. S. 371, 49 L. Ed. 1089, 25 S. Ct. 662. That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste . . . took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.”

If our interpretation of the Crow treaty of 1868 is cor-

rect, and this is the chief matter in controversy here, the defendants or appellees can have no defense as being prior in time to the rights of the plaintiffs. Their only defense could be abandonment by plaintiffs of their rights under the rule in the case of the **United States v. Hibner**, 27 F. 2d, 909, or that there was a surplus of water available at all times over the needs of plaintiffs.

This Court has decided that the laws of Montana have no bearing whatsoever concerning water rights on Indian treaty reservations. In its decision in the case of **United States v. McIntire** (101 F. 2d, 650, 654), involving water rights on the Flathead Indian Reservation in Montana, this Court stated:

“Appellees seem to contend that Michel Pablo acquired by prior appropriation the rights in question by local statute or custom, and that the Act of July 26, 1866, 43 U. S. C. A., Sec. 661, requires recognition of those rights. That statute, however, applies only to ‘public lands.’ *Winters v. United States*, 9 Cir. 143 F. 740, 747, affirmed 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340. Lands which are reserved are severed from the public domain. *Leavenworth, etc., R. R. Co. v. United States* 92 U. S. 733, 745, 23 L. Ed. 634; *United States v. Minnesota*, 270 U. S. 181, 206, 46 S. Ct., 298, 70 L. Ed. 539. The statute mentioned, therefore, does not, we think, apply here. Likewise, the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana Enabling Act specifically provided that Indian lands, within the limits of the state ‘shall remain under the absolute jurisdiction and control of the Congress of the United States.’ ” 25 Stat. 676 Section 4.

This Court has also emphatically ruled that federal courts have jurisdiction over controversies involving the interpretation of treaties made between the United States

and Indian tribes. In an almost parallel case, **McCauley v. Makah Indian Tribe et al**, 128 F. 2d 867, the matter in controversy was the interpretation to be given the Makah Indian treaty of 1859 (12 Stat. 939) between the Makah tribe and the United States, in determining the fishing rights of the Makah Indians. The provisions of the Makah treaty in dispute are identical with the provisions of the Yakima treaty of June 9, 1855, 12 Stat. 951, which were construed by the Supreme Court of the United States in the case of **Tulee v. State of Washington**, 62 S. Ct. 862, 86 L. Ed. 1115. The appellants attacked the jurisdiction of the federal courts. In its opinion this Court held (p. 868):

“This is an appeal from a decree of the district court enjoining the appellants, found to be and admitted here to be purporting to act as officers of the state of Washington in enforcement of its fish and game laws, from interfering with appellees’ certain fishing rights in the Hoko river, held to belong to and to be secured to the Makah Indian tribe and its members by treaty of 1859 between the tribe and the United States, 12 Stat. 939.

“The complaint seeking injunctive protection of the Indians’ rights under their treaty, contrary to appellants’ contention, is one whose subject matter is within the jurisdiction of the district court. 54 Stat. 143, 28 U. S. C. A., No. 41 Subd. (1) (a). (Emphasis supplied.)

In the Powers case the Supreme Court of the United States and this Court (59 S. Ct. 344, 94 F. 2d 783) construed the Crow treaty of 1868. In the Makah case the Supreme Court of the United States interpreted the certain provisions of the Yakima treaty of June 9, 1859, which were identical with the provisions of the Makah treaty involved in the Makah case. This Court held the United States Dis-

trict Court had jurisdiction which we consider controlling in this case at bar.

In the instant case appellants as successors in interest to original Crow Indian allottees succeeded to the rights of the original allottees to the waters of Crow reservation streams as reserved to them by the Crow treaty of 1868. Appellees are trespassing upon these rights of plaintiffs. The matter in controversy here involves an interpretation of the Crow treaty of 1868 as did the Makah case involve an interpretation of the Makah treaty of 1869.

There should be no question here that the federal courts have jurisdiction of the controversy under Title 28 U. S. C. A., Sec. 41, Subd. (1) (a).

The lower court relied upon numerous patent cases (R. 33-36) to sustain its position that the federal court had no jurisdiction of this case. We fail to see any similiarity between a right arising under an Indian treaty and a right arising under a patent issued by the United States. At the time the United States issues a fee patent to a tract of land, it divests itself completely of all title and interest. Not so as to any right to the use of water on an Indian reservation or any other right reserved by a treaty between the United States and an Indian tribe. This Court in the *McIntire* case stated, 101 F. 2d. 650, 653:

“The waters of Mud Creek were impliedly reserved by the treaty to the Indians. *Winters v. United States*, 207 U. S. 564, 577, 28 S. Ct. 207, 52 L. Ed. 340; *United States v. Powers*, 9 Cir. 94 F. 2d 783, 785, and cases cited. The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians. *Minnesota v. Hitchcock*, 185 U. S. 373, 387, 22 S. Ct. 650, 46 L. Ed. 954.”

The only controversy which can exist in this case if the averments in plaintiffs' complaint are true is the construction to be placed upon the treaty in reserving for the lands of plaintiff the waters of the south fork of Dry Head creek with the date of priority as of the date of the Crow treaty, May 7, 1868. Appellants have alleged all of the waters of this stream are necessary for the successful irrigation of their lands (R. 8, Par. XI), and that the rights of the appellees or defendants are much later in time, subsequent and inferior to the rights of appellants or plaintiffs (R. 9, Par. XIX). Certainly the appellees cannot contend that their rights are prior to the rights of plaintiffs or that plaintiffs have abandoned their rights or that there is a surplus of water in the stream to take care of the needs of the lands of plaintiffs and defendants. What then is the purpose of appellees is so vehemently contesting the question of jurisdiction? It is very apparent that if the federal court agrees with our interpretation of the Crow treaty, the defendants have no defense to the action and with the limited amount of water available in the stream, their lands will be deprived of water which they are now enjoying as trespassers upon plaintiffs' treaty rights. No question but that the purpose of appellees is to avoid trial and determination of any issue and settlement of whatever controversy may exist by way of the interpretation of the Crow treaty by the federal courts, out of which comes plaintiffs' rights to the use of these waters.

The allegations contained in plaintiffs' amended complaint are sufficient to affirmatively show that the value

of the matter in controversy exceeds \$3000, exclusive of costs.

The lower court held that plaintiffs had made no sufficient showing in their amended complaint, that the value of the matter in controversy exceeded \$3000, stating in its opinion (R. 37):

“In other words, when the value of the matter in controversy, exclusive of interest and costs, is challenged, it must be affirmatively shown to exceed \$3000. This has not been done in this case as appears conclusively from the authorities relied upon.”

As authorities the court cited the cases of **KVOS, Inc., v. Associated Press**, 299 U. S. 269, 81 L. Ed. 183, 57 S. Ct. 197, and **McNutt v. General Motors Corp.**, 298 U. S. 178.

We find no fault with the rule laid down by the Supreme Court of the United States in the **KVOS** case, 81 L. Ed. 183, 187:

“No facts are pleaded which show the value of that right. The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars and the amount involved is in excess of that sum. Such a formal allegation is sufficient unless the bill contains others which qualify or retract from it in such measure that when all are considered together, it cannot fairly be said that jurisdiction appears on the face of the complaint, in which case the suit should be dismissed by the court sua sponte or upon the defendants' motion. In this case the formal allegation is not re-enforced or strengthened by other portions of the complaint; neither is it neutralized or weakened by qualifying or detracting allegations.”

The lower court in examining the amended complaint of plaintiffs was of the opinion that the only allegations contained in the complaint was the unsupported statement that the matter in controversy is of value exceeding \$3000. (R.

36.) This is not correct and the lower court is plainly in error.

Plaintiffs in their amended complaint in paragraph I allege (R. 2), **“That the value of the matter in controversy exceeds, exclusive of costs, the sum of Three Thousand dollars (\$3,000),”** and in paragraph XV (R. 9), allege:

“That plaintiffs intend to irrigate approximately one hundred fifty (150) acres planted to alfalfa hay, orchard and garden on the above described lands during the coming farming and irrigation season; that during the months of May, June, July, August and September of this year plaintiffs will require all of the waters flowing in the south fork of Dry Head Creek to irrigate their said crops.”

And in paragraph X (R. 8) plaintiffs allege:

“That the aforesaid lands of plaintiffs are dry and arid in character and will not without artificial irrigation produce crops. That plaintiffs’ predecessors in interest constructed a dam in the south fork of Dry Head Creek and an irrigation system to carry the waters of said creek to said lands. That with the assistance of artificial irrigation from the south fork of Dry Head Creek, said lands will produce and have produced crops of hay, grain and vegetables, with the exception of the years 1944 and 1945 as herein set forth.”

These allegations contained in these three paragraphs construed together plainly amount to an allegation by plaintiffs that the value of an adequate water right to 150 acres of irrigable land and the dam and irrigation system appurtenant thereto exceeds without costs the sum of Three Thousand Dollars (\$3000), the matter in controversy involved in this case.

The lower court gave no consideration whatsoever to these allegations in plaintiffs’ amended complaint. All of the allegations of the complaint must be considered as true

in consideration of defendants' consolidated motion to dismiss. There can be little, if any argument, to the value of a water right to 150 acres of irrigable land as not being worth at least \$3000. In any event plaintiffs have clearly so alleged in their complaint, which is all that is necessary under the rule in the cases cited by the lower court. If the value is less than \$3000 such is an issue and can be properly determined upon the trial of this cause.

The United States is neither a necessary nor an indispensable party plaintiff in this action.

In so far as the record in this case is concerned, no interest of the United States appears and we will stand on the record in this respect. It is only fair, however, to advise the Court that in the watershed of Dry Head Creek there may be certain Indian lands in trust status which would have a right to their pro rata per acre share of the available waters under the rule laid down in the Powers case at such time as the owners of these lands decided to construct an irrigation system to irrigate their lands. Irrigation of such trust land is extremely doubtful due to the small amount of water available in the south fork of Dry Head Creek. All of the present diverters of the waters of the south fork of Dry Head Creek have been named in this action.

We do not deem the presence of the United States necessary in this action. The Court in its decree could adjudicate rights between the parties and make its decree subject to these potential rights of trust lands at the time such lands were irrigated when such irrigable acres thereof

would possess the same pro-rata per-acre rights as other acres on the Crow Indian reservation in that watershed with the same priority.

Should the United States consider that the rights of its Indian wards would be affected by any decree entered in this case it could readily intervene in the action.

The real property involved in this controversy, plaintiffs' rights to the use of waters in the south fork of Dry Head Creek, are not in trust status. Plaintiffs have alleged title in fee to their rights to the use of said waters (Pars. III, V, XVI of amended complaint) (R. 3, 4, 9, 10) and to all of the waters flowing in said creek which are required for the adequate irrigation of their lands located within the boundaries of the Crow Indian reservation (Pars. XI, XV, XVI of amended complaint) (R. 8, 9, 10).

Defendants contend the United States now holds legal title to the lands and waters involved in this action, and hence is an indispensable party plaintiff. (R. 25, 26.) They are undoubtedly confused by the following allegations contained in paragraph VIII of plaintiffs' complaint:

“That by the establishment of the Crow Indian reservation, on May 7, 1868, the United States became the trustee of the Crow Tribe of Indians, holding legal title to all of the lands and waters of the Crow Indian reservation and at that time, on May 7, 1868, there was then reserved to said Indians and their successors in interest for irrigation and other beneficial uses upon the lands of said reservation, and exempted from appropriation under territorial or state laws or otherwise, all of the waters of reservation streams necessary for the successful irrigation of irrigable lands upon said reservation, including all of the waters of the south fork of Dry Head Creek, which are necessary for the successful irrigation of plaintiffs' lands herein described.”

Plaintiffs did not allege the United States now held in trust all of the lands and waters on the Crow Indian reservation. We alleged such was the situation on May 7, 1868, many years before even the survey of the reservation as provided in the treaty, before allotment and before the issuance of trust or fee patents.

Plaintiffs hold fee title to the lands and waters involved. The United States has no present interest in the waters of Dry Head Creek. No rights of the United States or of any trust lands and waters are involved in this controversy.

The defendants may be further confused by this language of the United States Circuit Court of Appeals for the Ninth Circuit in the case of **United States v. McIntire** 101 F. 2d., 650, 653:

“The waters of Mud Creek were impliedly reserved by the treaty to the Indians. *Winters v. United States*, 207 U. S. 564, 577, 28 S. Ct., 207, 52 L. Ed. 340; *United States v. Powers*, 9 Cir., 94 F. 2d 783, 785, and cases cited. The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians. *Minnesota v. Hitchcock*, 185 U. S. 373, 387, 22 S. Ct. 650, 46 L. Ed. 954.”

There, the Court clearly had in mind lands and waters in trust status at the time of the treaty and before survey and allotment and the issuance of fee patents.

We respectfully submit the United States District Court for the District of Montana has jurisdiction to hear and determine the issues involved, and that defendants' consolidated motions to dismiss should be overruled.

Respectfully submitted,

SIMMONS AND ALLAN,

By Kenneth R. L. Simmons,
Attorneys for Appellants.

Personal service of the within and foregoing brief of appellants and receipt of three copies thereof is hereby acknowledged this.....day of August, 1947.

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Horace S. Davis,
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Marion B. Porter,
Norman Hanson.

By
Attorneys for Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit

B. M. PHELPS and ALICE E. PHELPS,
Appellants,
vs.
FLOYD HANSON, EZRA HANSON, SARA
HANSON and EVA M. HAMMOND,
Appellees.

Brief for Appellees

**Upon Appeal from the District Court of the United
States for the District of Montana.**

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Filed, 1947.

....., Clerk



No. 11641

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United States Circuit Court of Appeals

For the Ninth Circuit

B. M. PHELPS and ALICE PHELPS,
Appellants,

vs.

FLOYD HANSON, EZRA HANSON, SARA
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Appellees.

BRIEF FOR APPELLEES

I.

ABSTRACT OF THE CASE

To supplement the statement of the case made in the appellants' brief (*App. Br.*, pp. 3-7) counsel for the appellees note these further facts in the record at bar:

The only allegation in the amended complaint of the value of the matter in controversy between the litigants is found in paragraph I in these words (*R. 2*):

" . . . That the value of the matter in controversy exceeds, *exclusive of costs*, the sum of Three Thousand Dollars (\$3,000)." (*Italics supplied.*)

Paragraphs II, III and IV (*R. 22-24*) of the appellees' motions to dismiss, etc. (*R. 22-27*) were sustained by the district court (*R. 29-37*). These paragraphs appear in the appellants' brief in part only. (*App. Br.*, pp. 5-6) Accordingly, we set out here in full these paragraphs of the motion to dismiss as follows (*R. 22-24*):

“II.

To dismiss the plaintiffs’ amended complaint and action for the reason that it appears from the face of the amended complaint the court has no jurisdiction over the subject matter of the action.

“III.

To dismiss the plaintiffs’ amended complaint and action for the reason that the court is without jurisdiction, because the matter in controversy does not arise under (a) the Constitution of the United States, or (b) the laws of the United States, or (c) a treaty made under their authority.

“IV.

To dismiss the plaintiffs’ amended complaint and action for the reason that the court is without jurisdiction, because the matter in controversy does not exceed \$3,000.00, exclusive of interest and costs, as an inspection of the allegations of the amended complaint shows, and more particularly as appears otherwise in that

(a) The plaintiffs cannot recover herein any amount in excess of \$3,000.00, exclusive of interest and costs, nor any other amount at all; and

(b) The value of the right to the use of the waters, during the annual irrigation seasons, of the south fork of Dry Head Creek, delivered upon the plaintiffs’ lands and into their ditch or ditches, without interference by the defendants, which is the matter in controversy herein, does not exceed the sum of \$3,000.00, exclusive of interest and costs, but is to the contrary of a value not greater than \$50.00, or thereabouts; and

(c) The value of the plaintiffs’ right to the use, during the months of May, June, July, August and September of each year, of the water in the south fork of Dry Head Creek, delivered upon the plaintiffs’ lands and into their ditch or ditches, without interference, diversion or prior use by the defendants, which as the plaintiffs allege does not equal 60 miner’s inches of water, and which is the

matter in controversy herein, does not exceed the sum of \$3,000.00, exclusive of interest and costs, but is to the contrary of a value not greater than \$500.00, or thereabouts; and

(d) The value of the plaintiffs' right to the use of the waters in the south fork of Dry Head Creek during the annual irrigation seasons, as claimed by them in their complaint, without interference by the defendants, is because of the nature of the flow of the south fork aforesaid, of the creek bed, and of other attendant physical factors in nowise lessened or diminished by the use of the plaintiffs and their diversion of the waters in the south fork aforesaid as heretofore has long been customary and usual. Accordingly the matter in controversy is of inconsequential value, does not exceed the sum of \$3,000.-00, exclusive of interest and costs, and is to the contrary of a value not greater than \$500.00, or thereabouts; and

(e) The use and the diversion by the defendants of the waters of the south fork of Dry Head Creek, as has heretofore been usual and customary during the annual irrigation seasons, and as is alleged in the plaintiffs' amended complaint, does not appreciably diminish any right of the plaintiffs to the use of the flow of water in the south fork of Dry Head Creek at any time during the annual irrigation seasons aforesaid or otherwise. Accordingly, the diminution in value of the plaintiffs' rights as they claim because of any use or prior diversion by the plaintiffs does not exceed the sum of \$3,000.00, exclusive of interest and costs, and is to the contrary not more than \$500.00, or thereabouts, and

(f) The plaintiffs have not heretofore lost, and will not hereafter lose, any sum, whatsoever, or be prejudiced in any sum of money or amount at all because of the use or diversion of any waters of the south fork of Dry Head Creek by the defendants at any time."

These and the other motions presented by the appellees were heard in open court on October 28, 1946. (*R.* 28-29) The rec-

ord of the proceedings had at that time upon the submission of these motions, as are the court minutes, is as follows (*R. 28-29*):

“(Title of District Court and Cause.)

ORDER ALLOWING TIME TO FILE
SUPPLEMENTAL BRIEF

“This cause was duly called for hearing this day on the consolidated motions to dismiss the amended complaint, said motions having been filed on May 30, 1946, Mr. Kenneth R. L. Simmons being present and appearing for the plaintiffs, and Mr. Horace S. Davis being present and appearing for the defendants.

“Thereupon Court ordered said motions submitted on plaintiffs’ brief heretofore filed, counsel for plaintiff stating that the legal questions in the motions are covered in said brief, and further ordered that defendants be and are granted ten days to file a supplemental brief if so advised, the said defendants having heretofore filed a brief, but which brief may not cover the questions raised in the new motions, the said above-mentioned briefs having been filed on the consolidated motions directed to the original complaint herein.

“Entered in open Court at Billings, Montana, October 28, 1946.

H. H. WALKER, Clerk.”

At the hearing the appellants offered no evidence to sustain the jurisdictional statement made in their amended complaint which the appellees’ motion to dismiss directly challenged. Specifically beyond the naked allegations of that complaint itself the appellants offered nothing to show (*a*) that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, which the appellees’ motion directly denied (*Par. IV; R. 22-24*); or (*b*) that the matter in controversy

arises under the Constitution or the laws of the United States, or treaties made, or which shall be made, under their authority, etc., which is also denied (*Pars. II and III; R. 22*).

In short, upon the submission of these motions the appellants offered nothing to establish the facts upon which the jurisdiction of the lower court depended; a jurisdiction in law and fact with which the appellees took direct issue.

II.

POINTS OF LAW

The appellees contend on this appeal:

A. No matter in controversy arising under the Crow Treaty of May 7, 1868, is stated in the amended complaint or made to appear otherwise in the record herein.

B. The matter in controversy is not shown to exceed, exclusive of interest and costs, the sum or value of \$3,000.

III.

SUMMARY OF APPELLEES' ARGUMENT

The argument made by the appellees to sustain the order of dismissal below is to be summarized as follows:

First, no matter in controversy between the parties within *Section 41(1)(a), Title 28, U. S. Code*, otherwise *Section 24 (1)(a)*, as amended, *Judicial Code*, is alleged in the amended complaint to give the federal district court below jurisdiction of the cause. The appellants as the plaintiffs in the case by inference deraign their title to the controverted water rights from the United States, which in its turn has reserved to itself as trustee for the Crow Indians under the treaty of May 7, 1868, these

and other waters on the Crow Reservation.

But no controversy or dispute involving either these facts or this construction of the Crow Treaty or the effect of that treaty as alleged is set out. Indeed, the only issue between the parties which the amended complaint suggests is whether the appellees as the defendants in the cause have trespassed upon the rights which the appellants claim.

Neither in this nor in any other matter upon which the amended complaint touches is there tendered any issue involving the construction, the effect or the application of the Crow Treaty of May 7, 1868, upon which the appellants have contended federal jurisdiction is founded. Accordingly, the appellees contend, there is no federal jurisdiction of the cause, because no controversy is alleged involving either the construction, the application or the effect of this treaty.

In other words, the amended complaint alleges only a reservation to the United States as trustee for the Crow tribe of the lands and waters within the Crow Reservation, an allegation which is in nowise disputed consistent with the decided cases. The appellants take any title which they may have to the water rights described by derivation only from the United States. None of the appellants takes directly or immediately under or by virtue of the Crow Treaty.

Accordingly, the appellants are no differently circumstanced than any landowner in the Western states particularly, who holds a title deraigned by patent from the United States which in its turn has acquired its title by treaty with France, Mexico, the

various Indian tribes which formerly were sovereign, etc. In these latter cases jurisdiction is not given the federal courts merely because a treaty made by the United States originates the title ultimately vesting in the landowner. Nor for like reasons is there federal jurisdiction at bar.

Second, neither the amended complaint nor the record otherwise shows the matter in controversy to exceed, exclusive of interest and costs, the sum or value of \$3,000. The amended complaint alleges only that the value of the matter in controversy exceeds, "exclusive of costs," the sum of \$3,000. (*R. 2*)

The appellees' motion to dismiss (*R. 22-27*) appropriately joins issue by denial upon this jurisdictional statement: particularly, in paragraph IV, subparagraphs (a), (b), (c), (d), (e) and (f) (*R. 22-24*), is there denial that the value of this right involved meets the jurisdictional requirement. At the hearing upon this motion on October 28, 1946, the appellants did not, however, sustain their allegation of the amount involved or carry the burden cast thereby upon them. To resolve the issue joined by the appellees' motion that the controversy did not involve the jurisdictional amount of \$3,000 the appellants made no showing at all when the motion to dismiss was regularly heard and submitted. (*R. 28-29*)

Accordingly, the trial court had no other alternative than to dismiss for want of jurisdiction within the rule of

KVOS, Inc. v. Associated Press,
299 U S. 269, 81 L.ed. 183,
57 Sup. Ct. Rep. 197; and

McNutt v. General Motors etc. Corp.,
298 U. S. 178, 80 L.ed. 1135,
56 Sup. Ct. Rep. 780.

The order of dismissal from which the appeal here is taken is then right because there is neither statement nor showing in the record of a matter in controversy arising under the Crow Treaty of May 7, 1868, nor of a value at stake which exceeds \$3,000, exclusive of interest and costs.

IV.

ARGUMENT

The appellants' Specifications of Error Nos. I and II (*App. Br.*, p. 7), that the trial court erred in dismissing the amended complaint of plaintiffs and their cause of action and in not overruling the defendants' consolidated motions to dismiss amended complaint, for more definite statement, etc., filed in said action.

Foreword

Counsel at bar agree that the jurisdiction of the United States district court here depends upon *Title 28, U. S. Code, Section 41 (1)(a)*, otherwise *Section 24(1)(a), Judicial Code*, as amended. Thus the issue presented for determination upon this appeal is narrowed.

Diversity of citizenship is not relied upon, nor can it be. (*R. 3; Comp., par II*).

Accordingly, in our turn we quote the relevant language of the statute as the premise of the argument to follow. In point upon this appeal this statute reads:

Section 41. (Judicial Code, section 24 amended.) Orig-

inal jurisdiction. The district courts shall have original jurisdiction as follows:

(1) . . . : *civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, . . . : . . . , where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority”

Compliance with these provisions in bringing the cause at bar is asserted by counsel for the appellants, denied by the appellees and their counsel.

A.

No matter in controversy arising under the Crow Treaty of May 7, 1868, is stated in the amended complaint or made to appear otherwise in the record here.

The argument here opposes that of the appellants’ counsel presented first in their brief. (*cf. App. Br., pp. 7-14.*)

Nowhere in the amended complaint or in the record of the case made below, which the trial court ruled, is there stated any controversy involving any provision of the *Crow Treaty of May 7, 1868*, upon which the appellants allege their title depends. In the amended complaint there is a recital of the history of this treaty, the averment that the appellants’ rights are rooted therein.

But no controversy involving any paragraph, sentence or clause of that treaty is set out.

Of the amended complaint paragraph I is merely the bald statement that the jurisdiction of the United States district court below “attaches by virtue of the fact that the rights of

plaintiffs claimed herein arise under" the treaty in question, and that the value of the matter in controversy "exceeds, exclusive of costs, the sum" of \$3,000 (*R. 2*).

Paragraph V of the amended complaint summarizes the effect of this treaty in reserving for the Crow Indians their reservation lands, which are then particularly described (*R. 4-6*).

Paragraph VI locates the lands of the plaintiffs within the "boundaries of the Crow Indian Reservation as established by the Treaty of May 7, 1868," etc. (*R. 6*).

In paragraph VII the intent and "purpose of the United States of America in entering into the above-mentioned treaties" is alleged (*R. 6-7*).

In paragraph VIII there is the statement that "by the establishment of the Crow Indian Reservation, on May 7, 1868, the United States became the trustee of the Crow Tribe of Indians, holding legal title to all of the lands and waters of the Crow Indian Reservation and at that time, on May 7, 1868, there was then reserved to said Indians and their successors in interest for irrigation and other beneficial uses upon the lands of said reservation, and exempted from appropriation under territorial or state laws or otherwise, all of the waters of reservation streams necessary for the successful irrigation of irrigable lands upon said reservation," etc. (*R. 7*).

But in all these recitals there is no note or hint of any controversy concerning either the Crow Treaty or its construction or the content of the rights which the appellants may have thereunder. And it is of the "matter in controversy," of which

Section 41(1)(a), *supra*, speaks, and which here to give the courts of the United States jurisdiction must be stated in the complaint as a controversy arising under the Crow Treaty of May 7, 1868, and not otherwise.

The legal effect of this treaty in reserving to the Indians the use of the waters on their reservation is not debatable, and under the decisions of this Court and of the Supreme Court of the United States cannot be controverted. See

Winters v. United States, 207 U. S. 564, 52 L. ed. 340, 28 Sup. Ct. Rep. 207;

United States v. Powers, (C.C.A., 9th Cir.) 94 Fed. (2d) 783;

United States v. McIntire, (C.C.A., 9th Cir.) 101 Fed. (2d) 650.

Shortly stated the appellants in their amended complaint have merely asserted title to a waterright which derives, they say, from the Crow Treaty of May 7, 1868; they have stated there no controversy at all arising under that treaty. They allege at the most the ownership of waterrights which originate with the United States because of the implied reservation in trust to it under the Crow Treaty of May 7, 1868. But this is not enough.

Otherwise the present owner of every tract of land patented out by the United States, but which at one time lay within the boundaries of an Indian reservation, would be entitled to come into the federal courts because of a title originally stemming from a treaty made by the United States with an Indian tribe. Substantially all the lands in the territorial United States which lie beyond the borders of the thirteen original colonies have come

to their present owners by titles originating in treaties made with the Indians, with France, with Spain, with Mexico, etc.

In every such case the titles to these lands find their sources in a treaty made under the Constitution and the laws of the United States. These titles are vitalized by the laws of the United States, for they come by patent executed by the United States pursuant to its laws which convey out its ownership. Compare, for example, the original *Homestead Act of May 20, 1862, chap. 75, 12 Stat. 392*, and the subsequent amendments thereto.

But merely to recite the facts of such a title does not state a matter in controversy under *Section 41 (1)(a), supra*, and does not found federal jurisdiction. Such is the essence of the holding of the trial court below in this litigation (*R. 31, 33-35*).

(a) The appellees' authorities

Such are the decisions in point to which we now turn to sustain that holding.

In *Deere v. St. Lawrence Co.*, (*C. C. A., 2nd Cir.*) *32 Fed. (2d) 550*, noted in the decision of the court below (*R. 34-35*), there was presented a suit in ejectment by a plaintiff who claimed directly under two treaties made by the United States with Indian tribes. That is, as at bar, the plaintiff there as do the appellants here asserted a derivative right to the real property in issue under treaties made by the United States. The claim may best be phrased by an apt quotation from the opinion written in the Court of Appeals for the Second Circuit.

It is there said of the facts (*32 Fed. (2d) 550-551*):

“Appellant sues as a member of the St. Regis Tribe of

Indians, on his own behalf and of other members of the tribe. The bill alleges that the tribe was out of possession for over 100 years. We may take notice that the location of the St. Regis Indian Reservation is in Franklin county, New York, adjacent to the St. Lawrence river. It is supported by the state of New York, and does not embrace the locus in quo, which is St. Lawrence county on the Grasse river. This tract has been privately owned for over 100 years. The bill alleges that the St. Regis Tribe is a band of the Mohawk Nation, which Mohawk Nation is a constituent nation of the Six Nations of the Iroquois Confederacy; that by the treaty of Ft. Stanwix, made in 1784 (7 Stat. 15), the Six Nations were secured in peaceful possession of the lands they inhabited, including the locus in quo; by the treaty between the United States and the Seven Nations of Canada and the state of New York, made in 1796 (7 Stat. 55), this particular tract in question was reserved to the use of the St. Regis Tribe of Indians; that the appellant is a member of the St. Regis Tribe, and that the lands so reserved are set apart as a federal reservation for said tribe, and no part of the reservation, as originally created, has been disposed of by the United States, nor with its consent, and that the appellees are in wrongful possession, withholding the same from the appellant."

Then after noting that diversity of citizenship was not relied upon to sustain federal jurisdiction, the court has this to say of the law directly in point upon the appeal at bar (32 *Fed. (2d)* 551-552):

" . . . it is asserted by appellant that his right is founded upon the treaties of 1784 and 1796, which gave him a present right of possession. This claim denotes that the source of appellant's title is in the treaties of the United States, and such an allegation does not establish the claim that the suit arises under the laws of the United States, so as to confer original jurisdiction. In *Blackburn v. Portland*, 175 U. S. 751, 20 S. Ct. 222, 44 L.ed. 276, it was held, where a controversy arose in respect to lands, and where

one of the parties derived title upon an Act of Congress, that of itself did not present a federal question. In *Florida Cent. R. R. v. Bell*, 176 U. S. 321, 20 S. Ct. 399, 44 L.Ed. 486, which was an action for ejectment, the plaintiff's claim was under the patent granted by the United States and in proceedings in the Land Department; the defendants contended that the plaintiffs were not entitled to a patent under the laws of the United States, and the defendant claimed the right under an Act of Congress to erect its railroad upon the patented land. Jurisdiction was denied by the court in holding that mere assertion of title to land derived to the plaintiffs under and by virtue of a patent granted by the United States presented no question which of itself conferred jurisdiction under the Circuit Court of the United States. . . ."

Again in this opinion it is said (32 *Fed. (2d)* 552):

"... The treaties of 1784 and 1796 do not constitute a grant in praesenti to the plaintiff. Whatever right he had was a derivative right, and to succeed he must establish that he is entitled to the same right as his ancestors. . . ."

In this latter connection we note in passing the counsel for the appellants make no claim in their argument that by the treaty of May 7, 1868, any right to the use of the disputed waters in issue was reserved directly to the appellants, or conversely that any right of the United States reserved to it under this treaty is now adversed. Precisely as in the *Decre* case any right which the appellants may have is derivative and neither direct nor immediate. (*cf. App. Br., pp. 17-19*).

The Supreme Court in *Hull v. Burr*, 234 U. S. 712, 58 L.ed. 1557, 34 *Sup. Ct. Rep.* 892, has tersely put the rule in these words (58 L.ed. 1562):

"... The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or

controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that the suit arises under some Federal law. . . .”
(Italics supplied.)

In *Blackburn v. Portland etc. Co.*, 175 U. S. 571, 44 L.ed. 276, 20 Sup Ct. Rep. 22, the suit was pursuant to Sections 2325 and 2326, *Revised Statutes of the United States*; otherwise Sections 29, 30, Title 30, U. S. Code, to determine adverse claims to a mining location made under the applicable acts of Congress and founded thereon. In other words, the title to the Fair Play lode mining claim in dispute came directly from the United States through the laws of the United States enacted by the Congress. The suit owed its virtue and existence to the permission of federal statutes. Nevertheless, federal jurisdiction in the courts of the United States was denied by the Supreme Court in part in these words (44 L.ed. 280):

“ . . . If the parties to the controversy were citizens of different states, and if the matter in dispute exceeded the sum or value of \$2,000, then the claimant might elect to commence proceedings in a Federal or in a state court, because either would be competent to determine the question of the right of possession. But if the usual conditions of Federal jurisdiction did not exist, that is, if there was no adverse citizenship, and if the matter in dispute did not exceed \$2,000, then the party claimant could proceed in a state court.

“This court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which

had derived his title directly under an act of Congress, for that reason alone presented a Federal question. . . .”

Upon this statement there follows in the opinion a detailed analysis of the prior decisions of the Court to the point that a title originating in the laws of the United States does not alone give jurisdiction to the courts of the United States. There is in the *Blackburn* case particular note with approval of *Little York etc. Co. v. Keyes*, 96 U. S. 199, 24 L.cd. 656.

There Keyes began his action in the state court of California to restrain the defendants from polluting the waters of the Bear River by the deposit therein of the tailings and debris from their mining operations. The defendant, Little York Gold Mining & Water Company, Limited, and others impleaded with it removed the case to the United States circuit court alleging, among other things, that (24 L.cd. 657-658):

“ ‘ . . . your petitioners claim the right to work, use and operate said mines, and, in so doing, to use the channels of Bear River and its tributaries as a place of deposit for their said tailings under the provisions of the Act of Congress of the United States, entitled “An Act Granting the Right of Way to Ditch and Canal Owners Over the Public Lands, and for Other Purposes,” passed July 26th, 1866, and the Act amendatory thereof, passed July 9th, 1870, and the “Act to Promote the Development of the Mining Resources of the United States,” passed May 10th, 1872, and other laws of the United States.

“That said action arises under, and that its determination will necessarily involve and require the construction of, the laws of the United States above mentioned, as well as the preemption laws of the United States. That the mines of your petitioners are of great value, to-wit: of an aggregate value of not less than ten millions of dollars; and that if

your petitioners are prevented from using the said channels of Bear River and its tributaries as outlets for their said tailings and water, their said mines will be thereby rendered wholly valueless.”

The close parallel between these averments in the *Keyes* case and those of the amended complaint at bar, which are here for consideration, is obvious.

In denying jurisdiction upon the facts alleged the Supreme Court said (24 *L.ed.* 658):

“It is well settled that in the courts of the United States the special facts necessary for jurisdiction must, in some form, appear in the record of every suit . . .”

Specifically then the opinion continues (24 *L.ed.* 658):

“In this petition (for removal), *the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines* that can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of; and *they allege that they claim the right to this use under the provisions of certain specified Acts of Congress.* They also allege that the action arises under, and that its determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the preemption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes.” (Interpolation and italics supplied.)

Finally the Court here concludes (24 *L.ed.* 658-659):

“The statutes referred to contain many provisions; but the particular provision relied upon is nowhere indicated. A cause cannot be removed from a State Court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise

out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . .

“Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, ‘in legal and logical form,’ such as is required in good pleading. 1 Chit. Pl. 213, that *the suit is one which ‘really and substantially involves a dispute or controversy’ as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States. . . .*” (Italics supplied.)

Compare

Taylor v. Anderson, 234 U. S 74, 58 L.ed. 1218, 34 Sup. Ct. Rep. 724.

Finally, in closing the argument for the appellees under this point that no matter in controversy arising under the Crow Treaty of May 7, 1868, is disclosed by the record at bar, that accordingly the order of dismissal below for want of jurisdiction is clearly right we come again to the stubborn fact that the premise of the appellants’ contention, if accepted, would bring substantially every case involving a title to lands in the Western states within the jurisdiction of the United States courts. This premise this Court has already ruled unsound.

In *Gustason v. California Trust Co.*, (C.C.A., 9th Cir.) 73 Fed. (2d) 765), the plaintiff alleged, among other things, that the premises in dispute were the “public domain of the United States of America,” that they were encumbered with homestead entries filed in the Land Office of the United States, that the “basic title to said premises now does, and forever will, prevent

the existence of fee title to said premises in defendants, or any of them," etc.

In affirming a judgment of dismissal entered by the district court this Court said by way of quotation from its earlier opinion in *Wilson v. Robinson*, (C.C.A., 9th Cir.) 16 Fed. (2d) 431, what is again directly applicable at bar (73 Fed. (2d) 767):

" . . . 'The only ground upon which the plaintiff seeks to predicate federal jurisdiction is that the case arises under the laws of the United States. It is familiar knowledge that, to bring a case within this branch of jurisdiction, it must affirmatively and distinctly appear from the averments of the pleading that "it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of" a federal law, "upon the determination of which the result depends." It has further been authoritatively stated that "this is especially so of a suit involving rights to land acquired under a law of the United States. *If it were not, every suit to establish title to land in the Central and Western states would so arise, as all titles in those states are traceable back to these laws.*"' " (Italics supplied.)

To support this conclusion there is the further citation in the *Gustason* decision from the Supreme Court of the United States of

Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 44 L.ed. 864, 20 Sup. Ct. Rep. 726.

At this date there is no reason apparent, we submit, to justify a departure from the rule of these authorities, unless the cases noted in the appellants' brief (*App. Br., pp. 7-14*) compel a restatement of the rule otherwise applicable.

(b) *The appellants' authorities*

That these citations by adversary counsel have no such force, and are themselves not in point at bar is abundantly clear upon a first reading.

In *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 65 L.ed. 577, 41 Sup. Ct. Rep. 243, the "matter in controversy" bore no faint resemblance to the case framed by the appellants' amended complaint. In the *Smith* case a shareholder in the Kansas City Title & Trust Company by his bill in equity sought to enjoin his company, its officers, agents and employees from investing the funds of the company in farm loan bonds issued by Federal Land Banks or Joint Stock Land Banks under authority of the *Federal Farm Loan Act of July 17, 1916*, as amended. After noting the rules by which the jurisdiction of the federal court is measured in such a case, as counsel for the appellants here have quoted from this opinion in their brief (*App. Br.*, pp. 7-8), there follows a statement by the Court itself of the actual matter in controversy arising under the laws of the United States which the bill in the *Smith* case fairly and directly presented.

We quote on our part from the *Smith* case (65 L.ed. 586):

"The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional, and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were

issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue."

Such a decision upon its facts is in point at bar certainly to indicate the general principles of law involved. The very statement of the controversy in the *Smith* case, as the Supreme Court has summarized the bill there before the Court, is to exclude the amended complaint reviewed on this appeal from the jurisdiction of the federal courts altogether.

There the outcome of the litigation depended solely and entirely upon a determination whether the challenged federal statutes were constitutional; here no controversy turns at all upon the holding already settled law that if the appellants' rights derive from the Crow Treaty, they have priority as of date May 7, 1868. Indeed, by inadvertence the appellants' brief recognizes precisely as much.

For it is there written (*App. Br., pp. 10-11*):

"If our interpretation of the Crow Treaty of 1868 is correct, and this is the chief matter in controversy here, the defendants or appellees can have no defense as being prior in time to the rights of the plaintiffs. Their only defense could be abandonment by plaintiffs of their rights under the rule in the case of the *United States v. Hibner*, 27 F. 2d. 909, or that there was a surplus of water available at all times over the needs of plaintiffs."

By the express admission then of adversary counsel the determination by this Court that the appellants' rights depend upon the Crow Treaty will not determine this case at all, if the

appellees establish abandonment by the appellants of their rights, or a surplus of water available at all times beyond the needs of the appellants. Nor will any construction of the Crow Treaty avail as an answer to the claims of these litigants, if the appellees defend upon the ground that they have never taken any water coming to the appellants under their right, that the waters which pass the appellees' lands sink and never reach the appellants' fields.

In the language of the *Smith* case cited by adversary counsel themselves to sustain their appeal here it is written, as is the quotation above, that the controversy which gives federal jurisdiction must question the validity or effect of the federal statute at bar and must be determinative of the entire litigation before the court. The rule applicable where a treaty is in the case can be no different.

But such is not the case which the amended complaint presents. We comment again unwittingly the appellants' counsel have conceded as much.

Nor is there comfort for the appellants' position in the citation of

United States v. Powers, 305 U. S. 527, 83 L.ed. 330, 59 Sup. Ct. Rep. 344, or *Winters v. United States*, 207 U. S. 564, 52 L.ed. 340, 28 Sup. Ct. Rep. 207. (*App. Br.*, pp. 9-10)

Neither the court below nor counsel for the appellees at bar dispute in any particular the rule of these decisions. Indeed, such dispute at this late date is impossible.

That is, because the rule of the *Powers* and *Winters* cases may

not be disputed there is in the amended complaint at bar no faint hint of a controversy under either the Constitution or laws of the United States, or the Crow Treaty of May 7, 1868. There is here no debatable ground, we note again. Accordingly, there is for the appellants' counsel no support in the citation of these cases.

We accept the rule of these authorities as a binding construction of the Crow Treaty itself. With that rule and with that construction we have on the part of the appellees no quarrel in this litigation. And none is forecast in the amended complaint.

Not only are the *Winters* and *Powers* cases settled law; there is also nothing in either of the opinions written in these cases to suggest jurisdiction of the dispute framed by the amended complaint here reviewed. In both the *Winters* and the *Powers* cases jurisdiction in the courts of the United States was given because the United States was itself the plaintiff. Jurisdiction under the statute followed for this reason. See *Section 41(1), Title 28, U. S. Code; Section 24, as amended, Judicial Code.*

At bar the appellants as plaintiffs assert a cause of action in their own right. They expressly disclaim any connection with the United States at this date, particularly that the United States is in anywise interested in the litigation, or properly a party thereto. (*App. Br., pp. 17-19*) Then neither *United States v. Powers* nor *Winters v. United States* is authority for the premise which the appellants postulate, viz., that jurisdiction is conferred in this case upon the courts of the United States, because a matter in controversy arising under the Crow Treaty

of May 7, 1868, exists between the parties. Jurisdiction in neither the *Winters* nor the *Powers* case was recognized or accepted because of any such controversy, but rather because the United States was itself the plaintiff.

We may then lay to one side as wholly pointless here both of these decisions, which adversary counsel have stressed so emphatically. For what these cases stand we accept them in their entirety. Neither suggests jurisdiction of the appellants' cause now at bar in the district court of the United States below. Accordingly, the citation of these decisions to sustain the contention presently made by the appellants' counsel is not apt.

There is citation of *United States v. McIntire*, (C.C.A., 9th Cir.) 101 Fed. (2d) 650, to spell out jurisdiction in this litigation. (App. Br., pp. 11, 13). The *McIntire* case did not consider *Section 41(1)(a)* under which adversary counsel here assert jurisdiction. The *McIntire* case considered no phase of the jurisdictional question here drawn in issue. Rather the *McIntire* case was brought against the United States upon the theory that the plaintiff and the United States were either tenants in common or joint tenants of the waterrights involved, and that accordingly jurisdiction was given by *Section 41(25)*, *Title 28, U. S. Code*, otherwise *Section 24(25)*, *Judicial Code*, as amended. (cf. 101 Fed. (2d) 652, 653) Even so, jurisdiction was denied the United States District Court for Montana.

In *McCauley v. Makah Indian Tribe*, (C.C.A., 9th Cir.) 128 Fed. (2d) 867, the Indians sued as a tribe to enjoin the direct and immediate violation by certain officers of the state of Wash-

ington of rights secured to them by their treaty with the United States concluded in 1859. The case there was as though at bar the Crow tribe had sued to enjoin rights secured directly to the Crow Indians by their treaty of May 7, 1868. In the *McCauley* case the rights asserted by the Indians were directly denied and immediately invaded by the defendants.

The amended complaint reviewed on this appeal states no such controversy. The rights secured to the Crow Indians by their treaty as are the holdings in the *Winters* and *Powers* cases are not denied and are not invaded by the appellees. The amended complaint makes no show of any such denial or invasion.

Rather the appellants as "citizens and residents of the State of Montana" (*R. 3*) claim a derivative right under the Crow Treaty of May 7, 1868, which as secured to the Indians by that treaty and as defined in the *Winters*, *Powers* and *McIntire* cases is not controverted. Certainly, as the opinion in the *McCauley* case puts it, the matter in controversy there presented between the Makah tribe and the officers of the state of Washington is within the jurisdiction of the federal courts under *Section 41(1) (a), Title 28, U. S. Code*. That is, present the requisite jurisdictional amount of \$3,000.

Compare *Makah Indian Tribe v. McCauley*, (*D. C., Wash.*) 39 *Fed. Sup.* 75, at 77.

There is again in the rule of the *McCauley* case far cry from a holding which sustains the appellants' premise at bar. The *McCauley* decision is no authority that "citizens and residents of the State of Montana" may appeal to the jurisdiction of the

United States courts to hear a case which involves no controversy disputing the rights of the Crow tribe under their treaty, rights long settled and recognized by all parties.

Tulee v. Washington, 315 U. S. 681, 86 L.ed. 1115, 62 Sup. Ct. Rep. 862, originated in the state courts. The case went from the Supreme Court of the state of Washington to the Supreme Court of the United States on appeal under *Section 344 (a), Title 28, U. S. Code*. The jurisdiction of a federal district court under *Section 41(1)(a)* in any case was neither considered nor decided. Nor was this latter statute involved in any phase of the case.

Tulee, the defendant in the state court, was convicted under the state law of a state offense, because he caught salmon without a state license. He defended by asserting his rights as an Indian under the treaty of 1859 between the United States and the Yakima tribe. The Washington court held the statute under which Tulee was convicted was not repugnant to the treaty. Thus was federal jurisdiction on appeal from the highest court of the state of Washington to the Supreme Court of the United States founded.

Again the citation by adversary counsel of the *Tulee* decision is a citation without point in our view upon this appeal. It may even be conceded that Tulee could have brought his action directly in a federal court sitting in the state of Washington to enjoin the invasion of the right directly given him under the Yakima treaty, had he sought this relief and had the jurisdictional amount of \$3,000 been involved. Even so, juris-

diction of the appellants' cause at bar in the federal courts is not made out.

For with Tulee the right under the Yakima treaty directly set up by him was directly and immediately adversed and denied by the state officials. Again, such is not the case here presented. The appellants claim title to a waterright which by inference they allege has descended to them from the United States, which in its turn took by the reservations made in the Crow Treaty of May 7, 1868. To this point the construction and effect of the treaty is not in controversy, is not disputed. No such dispute or controversy involving the construction or effect of the treaty is stated in the amended complaint, as was the case with Tulee. The *Tulce* case is accordingly under any construction of its facts without force in support of the appellants' contention.

We submit in summary of the point here that the amended complaint states no controversy arising under the treaty of May 7, 1868, between the United States and the Crow Indians, that at most the amended complaint merely alleges a title derived by the appellants from the United States to waterrights which the United States acquired in trust under the treaty of May 7, 1868. But this is not enough. Accordingly, jurisdiction in the United States District Court for the District of Montana fails.

The rule below is right; the order of dismissal entered by the trial court should be affirmed.

B.

The matter in controversy is not shown to exceed, exclusive

of interest and costs, the sum or value of \$3,000.

Jurisdiction in the federal courts of the cause asserted in the amended complaint at bar fails also for the further reason that there is no showing the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000. Yet such a showing affirmatively made is an indispensable element of federal jurisdiction.

Section 41(1)(a) is specific to this point. The requirement is that the matter in controversy must exceed, “exclusive of interest and costs,” the stipulated sum or value.

The statute is not satisfied where the matter in controversy, “exclusive of costs,” is more than \$3,000. The command is that before federal jurisdiction can attach there must be excluded from the matter in controversy not only costs, but also interest.

The allegations of the amended complaint themselves fail to disclose the first essentials of federal jurisdiction.

The amended complaint alleges only (*R. 2*):

“. . . That the value of the matter in controversy exceeds, *exclusive of costs*, the sum of Three Thousand Dollars (\$3,000).” (*Italics supplied.*)

On its face and without denial by the appellees this recital is not sufficient to satisfy the minimum requirements of the Supreme Court in its definition of federal jurisdiction under *Section 41(1)(a)* as announced in

KVOS, Inc. v. Associated Press,
299 U. S. 269, 81 L.ed. 183,
57 Sup. Ct. Rcp. 197; and

McNutt v. General Motors etc. Corp.,
298 U. S. 178, 80 L. ed. 1135,
56 Sup. Ct. Rep. 780.

In the *Associated Press* case the bill at bar alleged (81 L.ed. 184):

“ . . . : ‘the damage to which complainant is being subjected . . . is in excess of the sum of Three Thousand (\$3,000.00) Dollars, *exclusive of interest and costs*, and the amount involved herein and in controversy herein is in excess of said sum of Three Thousand (\$3,000.00) Dollars, *exclusive of interest and costs.*’ ” (Italics supplied.)

It is of this allegation which the Supreme Court says in its opinion later on (81 L.ed. 187):

“ . . . Therefore the court would not have been bound to dismiss upon a motion based solely on alleged insufficient pleading of the amount in controversy; . . . ”

In the *McNutt* case Mr. Chief Justice Hughes speaking for an unanimous Court, first notes the question for decision is (80 L.ed. 1136):

“ . . . whether the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, so as to give the District Court jurisdiction. Judicial Code, Sec. 24 (1), U. S. C. A. title 28, sec. 41(1). . . . ”

Of the impact of this statute upon a case brought before a district court of the United States the opinion in the *McNutt* case says directly in point here (80 L.ed. 1141):

“ . . . The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. . . . ”

We repeat, the bare essentials of federal jurisdiction are not alleged in the amended complaint. The allegation there that the matter in controversy exceeds the sum of \$3,000, "exclusive of costs," is not the allegation of the facts which satisfy the statute. There shall also be excluded interest. We submit the appellants are out of court on the face of the amended complaint, and without more.

Even so, by their motion to dismiss the appellees have taken direct issue with the value of the matter in controversy as the amended complaint has assumed to state that value. By paragraph IV(a) of that motion (*R. 23*) the appellees deny that the appellants can recover in this action "any amount in excess of \$3,000.00, exclusive of interest and costs, nor any other amount at all."

By paragraph IV(b) the appellees' motion asserts the "value of the right to the use of the waters," which the appellants claim, and "which is the matter in controversy herein, does not exceed the sum of \$3,000.00, exclusive of interest and costs, but is to the contrary of a value not greater than \$50.00, or thereabouts" (*R.23*).

In like manner paragraphs IV(c), IV(d), IV(e) and IV(f), which follow (*R. 23-24*), put directly in issue the appellants' claim of an amount or value in controversy sufficient to give the district court below jurisdiction of the litigation.

Yet in these circumstances, when the appellees' motion to dismiss was heard in the trial court on October 28, 1946, there was submission on the part of the appellants without evidence or

proof to sustain their claim of jurisdiction, or to support the allegation that the matter in controversy exceeded the sum of \$3,000.00, "exclusive of costs," as their amended complaint reads (*R. 28-29; 2*). Certainly the cause was properly dismissed by the lower court.

The motion to dismiss appropriately put in issue the court's jurisdiction to hear the cause at all, and upon the hearing called for proof by the appellants to sustain the jurisdiction which they asserted. Again, directly in point are the decisions in the Supreme Court of

KVOS, Inc. v. Associated Press,
299 U. S. 269, 81 L.ed. 183,
57 Sup. Ct. Rep. 197; and

McNutt v. General Motors etc. Corp.,
298 U. S. 178, 80 L.ed. 1135,
56 Sup. Ct. Rep. 780.

In the *Associated Press* case it is said in point here (81 L.ed. 188):

" . . . But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof. The petitioner's motion was an appropriate method of challenging the jurisdictional allegations of the complaint. It did not operate merely as a demurrer, for it did not assume the truth of the bill's averments and assert that in spite of their truth the complaint failed to state a case within the court's jurisdiction. On the contrary the motion traversed the truth of the allegations as to amount in controversy and in support of the denial recited facts dehors the complaint. This could have been done by answer but the time for answer had not arrived when the rule to show cause was issued and petitioner was faced with the possibility of an injunction. The motion required the trial court to inquire as to

its jurisdiction before considering the merits of the prayer for preliminary injunction. And in such inquiry complainant had the burden of proof . . .”

In the case at bar on October 28, 1946, the appellees’ motions to dismiss were for hearing; the court proceeded then to inquire into its jurisdiction. Counsel for the appellants stated that “the legal questions in the motions are covered in said brief.” Then without a showing of any kind to sustain their claim of jurisdiction the appellants rested this hearing (*R. 28-29*).

Thus was the lower court brought face to face with the command of the Supreme Court in the *Associated Press* case to this effect (*81 L.cd. 189*):

“Since the allegation as to amount in controversy was challenged in appropriate manner, and no sufficient evidence was offered in support thereof, the bill should have been dismissed. . . .”

Precisely such was the rule of dismissal from which this appeal is prosecuted.

The *McNutt* case is equally conclusive. There following upon the quotation already made above from the text of this opinion the Court said (*80 L.cd. 1141*):

“ . . . If he does make them (allegations requisite to jurisdiction), an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be

maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the courts may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty."

The order of dismissal from which this appeal is taken conforms to this command. The appellants failed to carry the burden of proof which was with them below. Rightly they were then ruled out of court.

To the same point that this cause was rightly dismissed below for want of any sufficient showing that the jurisdictional amount required was in controversy we cite without specific comment the cases and texts following:

Electro Therapy etc. Corporation v. Strong,
(C.C.A., 9th Cir.) 84 Fed. (2d) 766;

Subirana v. Kramer, (C.C.A., 1st Cir.)
17 Fed. (2d) 725;

Abbott v. Eastern Massachusetts etc. Co.,
(C.C.A., 1st Cir.) 19 Fed. (2d) 463;

Makah Indian Tribe v. McCauley, (D. C., Wash.) 39
Fed. Supp. 75 (suit by Indian tribe to enforce treaty
rights requires jurisdictional amount of \$3,000 as well
as federal question), reversed on other grounds by

McCauley v. Makah Indian Tribe,
(C.C.A., 9th Cir.) 128 Fed. (2d) 867);

Tecters v. Henton, (D. C., Wyo.) 43 Fed. (2d) 175, at 177 (trespasses on Indian reservation if presenting federal question must involve jurisdictional amount);

Zicos v. Dickmann, (C.C.A., 8th Cir.) 98 Fed. (2d) 347;

35 C.J.S. 833, sec. 28, and cases cited in note 12;

35 C.J.S. 840, sec. 29 (cases arising under treaties involve like jurisdictional requirements as to amount in controversy).

Compare also

Healy v. Ratta, 292 U. S. 263,
78 L.ed. 1248, 54 Sup. Ct. Rep. 700.

We submit that the second point of law made by the appellees is also sustained. Accordingly, for this further reason the order of dismissal entered by the trial court merits an affirmance.

V.

CONCLUSION

In the paragraphs above the appellees have made their argument to sustain the order from which this appeal is taken. They have there drawn their conclusions. More by way of summary of the appellees' contentions is not pertinent here.

But there is one paragraph in the appellants' brief (*App. Br.*, p. 14) which yet calls for appropriate comment. Appropriately that comment is made to close this brief.

Because counsel for the appellees have not acquiesced without murmur in an effort to foist upon the district court below jurisdiction where in law no jurisdiction is given, they are accused of trying to "avoid trial and determination of any issue and settlement of whatever controversy may exist by way of the inter-

pretation of the Crow Treaty by the federal courts, out of which comes plaintiffs' right to the use of these waters." (*App. Br.*, p. 14) As well charge the trial judge who sustained the appellees' motion to dismiss with complicity in the wrong done the appellants! All of which is of course sheer nonsense.

We suggest the appellants had this very case at issue in the state courts before this action was brought in the District Court of the United States for Montana. Rather than try out the issues there joined the case was dismissed. The cause is now here. There is complaint only because by their own deliberate choice counsel for the appellants have chosen to change the forum of the trial.

We submit they are as grievously in error in voicing their complaint because of the delay which has ensued as they are in framing the real issues of their cause.

Respectfully submitted,

H. C. CRIPPEN,

ROCKWOOD BROWN,

HORACE S. DAVIS,

Attorneys for Appellees.

Personal service of the within and foregoing Brief for Appellees made and admitted, and the receipt of three copies thereof acknowledged, this day of September, 1947.

SIMMONS & ALLAN,

By

Attorneys for Appellants.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

B. M. PHELPS and ALICE E. PHELPS, Appellants,

v.

FLOYD HANSON, EZRA HANSON, SARA HANSON and
EVA M. HAMMOND, Appellees

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF
MONTANA, BILLINGS DIVISION

Appellants' Reply Brief

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No. 11641

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Appellants' Reply Brief

FURTHER STATEMENT OF FACTS

The statement of facts contained in appellants' opening brief (pp. 3-7) and in brief for appellees (pp. 1-5) contains the essential facts involved in this litigation. The appellees, however, have in their brief (p. 35) cast a criticism on counsel for the appellants by indicating that the cause now here was first filed in the State court and later by this counsel dismissed and the action brought in the District

Court of the United States for Montana. A further statement of fact, therefore, seems appropriate to remove from this Court's mind the impression that counsel for appellants have instituted two actions, one in the State court and later upon its dismissal one in the District Court of the United States for Montana. The action was originally brought by the present appellants by counsel of R. C. Stong, now deceased, practicing attorney of the city of Billings, Montana, prior to his death. After Mr. Stong's death, the present counsel was employed by the appellants, who, upon a review of the facts involved, determined that the action should have been properly brought in the District Court of the United States for Montana. The present counsel for appellants, therefore, dismissed the action then pending in the State court and by the present action sought the forum of the United States courts rather than of the State court for the reason that a controversy existed concerning the interpretation of the Crow Treaty, which was a matter not properly subject to determination in the State court.

ARGUMENT

(A)

A matter in controversy arising under the Crow Treaty of May 7, 1868 is stated in the amended complaint and does appear in the record here.

The appellees, both in their brief in support of their consolidated motion to dismiss the amended complaint of plaintiffs and in their brief upon appeal from the District Court of the United States for the District of Montana,

have tried to escape the jurisdiction of the courts of the United States by eliminating from its determination the rights of the plaintiffs arising under the Crow Treaty. In support of appellees' argument they have confused the issue by attempting to compare plaintiffs' rights under the Crow Treaty with any land owner's rights arising under title based on patent issued by the United States pursuant to the homestead laws of the United States. Such comparison with plaintiffs' rights to the use of water for the lands owned by the plaintiffs, based on a priority contemporaneous with the date of the Crow Treaty, May 7, 1868, is not justified under the existing statutes enacted by the Congress relating to lands and water rights within the Crow Reservation and those relating to lands commonly termed as "public domain." The United States when it issues a patent pursuant to an act of Congress is by such act relinquishing all rights of the United States to patentee. **Los Angeles Farming Co. v. Los Angeles**, 30 S. Ct. 452; 217 U. S. 217; 54 L. Ed. 736. The cases cited by appellees in support of their contention that the question involved herein is similar to land titles derived by Acts of Congress are all founded on the premise that the United States having once held title does not present a Federal question. Appellants have no dispute with appellees on that contention and are not urging that the fact that the United States once held title to these water rights in and of itself creates a Federal question. Appellants do urge, however, that the rights under the Crow Treaty conveyed to them upon acquisition of the fee title to the land are now available to establish

their priority as against appellees, and the interpretation of said treaty, where it conflicts with state law does present a real Federal question establishing jurisdiction before the courts of the United States.

In the case of **Norton v. Larney**, 266 U. S. 511; 69 L. Ed. 413, the court was confronted with the proper construction to be placed on a treaty with an Indian tribe. It was found to present a Federal question sustaining the jurisdiction of the courts of the United States.

The United States in approving the Crow Treaty of May 7, 1868 and by the subsequent adjudicated case of the **United States v. Powers**, 59 S. Ct. 344; 305 U. S. 527; 83 L. Ed. 330, has recognized and reaffirmed the reservation of waters essential for cultivation of the reserved lands for the benefit of the owners of such lands. The purpose of plaintiffs' action was to quiet title in their names to the waters necessary for the irrigation of 150 acres of the lands described in the amended complaint. (R. 3-4.) In quieting title to these water rights it is essential that plaintiffs rely on the strength of their own title and not on the failure of an adversary's title. In order to justify plaintiffs' cause of action they must interpret the Crow Treaty of May 7, 1868 as reserving to the owners of the lands included within the reservation all of the waters to be beneficially used thereon. The controversy that arises in connection with the interpretation of the Crow Treaty as between appellants and appellees is the establishment of appellants' priority of 1868 without benefit of or reliance upon the applicable statutes of Montana relating to water rights. Ap-

pellees' rights to the use of the waters sought to be quieted in plaintiffs by their amended complaint must arise under the laws of the state of Montana. Appellants, on the other hand, by this action do not resort to the state statutes and if forced to attempt to quiet their title in the State court would be before said court without benefit of state statutes but placing reliance upon their rights as reserved to them under the Crow Treaty. The State court can, therefore, properly dismiss their action because of the controversy between appellants and appellees based on the interpretation of the Crow Treaty. In the case of **Anderson v. Spear-Morgan Livestock Company**, et al., 79 P. 2d 667; 107 Montana 18, decided by the Supreme Court of the State of Montana, May 23, 1938, a somewhat similar factual situation existed. In that case, however, an adjudication of all the right to the use of water on a certain stream was sought. Some of these lands were patented lands within the Crow Indian Reservation and derived their right to the use of water from the Crow Treaty of May 7, 1868. Title being in the United States to some of the riparian lands, the court held the United States was an essential party. Adjudication proceedings instituted under Chapter 81 of the Revised Codes of Montana, 1935, require a determination of the rights of all owners of land on the stream to be effective. Therefore, the United States, being an owner, was an indispensable party, and no consent to be sued being shown the action was dismissed. In this case appellants are not seeking an adjudication of their rights under state law, but seek to quiet title as against appellees. The important

analogy is the language of the Court in the Anderson case wherein it states:

“The federal government, having reserved these waters on the reservation was the owner of them and it was unnecessary for it to make an appropriation of these waters.”

And further:

“When the allottee became seized of fee simple title, after the removal of the restrictions of the trust patent, then a conveyance of the land, in the absence of a contrary intention, would operate to convey the right to use the water as an appurtenance.”

The analogy here is that appellants are entitled to the advantage of the priority established by the 1868 Treaty, and penalized if a subsequent appropriator under state law can maintain in the state court an action barring appellants from invoking the rights they have by virtue of the Crow Treaty. This is manifestly a controversy based on the interpretation of a treaty as contemplated to confer jurisdiction on the United States courts.

There is further support for this in the case of **United States v. McIntire**, 101 F. 2d, 650, wherein the court stated:

“Likewise, the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation.”

(B)

The value of the matter in controversy exceeds Three Thousand Dollars (\$3000.00) exclusive of interest and costs.

The appellees in their brief (pp. 27-34) have attacked appellants' allegation in their amended complaint (R. 2) “that the value of the matter in controversy exceeds, exclusive of costs, the sum of \$3000.00.” Section 41 (1) (a)

(Judicial Code, Section 24) grants the District Courts original jurisdiction “where the matter in controversy exceeds exclusive of **interest** and costs the sum or value of \$3000.00.” Appellants’ amended complaint (R. 2) omits the word “interest.” The Appellees in their consolidated motion to dismiss (R. 22-27) have sought dismissal of the amended complaint for the reason that the matter in controversy does not exceed \$3000.00, and have asserted in support thereof that the matter concerns a value not greater than \$50.00 or \$500.00. By said assertion appellees waived their objection to appellants omission of the word “interest” in their allegation of their amended complaint. The Court in its decision (R. 36-37) attempts to determine that the matter in controversy does not exceed the value of \$3000.00. The elimination of the word “interest” therefore is not pertinent to the matters involved in this appeal. In support of the Court’s dismissal of plaintiffs’ amended complaint the Learned Judge relied in part on the fact that the matter in controversy did not exceed \$3000.00. In support of his justification for dismissal the Court cited the case of *KVOS, Inc. v. Associated Press*, 299 U. S. 269; 81 L. Ed. 183; 57 S. Ct. 197, and also the case of *McNutt v. General Motors Corp.*, 298 U. S. 178; 56 S. Ct. 780; 80 L. Ed. 1135. A careful analysis of the *KVOS, Inc.* decision discloses that the Court had before it only the formal allegation that the matter in controversy exceeded \$3000.00. Plaintiffs’ amended complaint as set out in appellants’ opening brief (pp. 16 and 17) show further facts in support of the allegations concerning the value of the matter in

controversy. This was before the District Court on the verified petition of B. M. Phelps, one of the plaintiffs. The challenge to this allegation was made by appellees in paragraph IV of their consolidated motion (R. 22-24). In support of this challenge the appellees alleged that the value in one instance was \$50.00 and in the other \$500.00. The District Court, therefore, had before it plaintiffs' verified petition alleging the value in excess of \$3000.00 supported by allegations showing that they intend to irrigate 150 acres of land by the use of the waters for which they were claiming title. In challenge of these allegations was defendants-appellees' bare statement that the matter did not exceed \$50.00 to \$500.00. The Court by its order of October 28, 1946 (R. 28-29) thereupon ordered the motion to dismiss submitted on written briefs. No opportunity was given plaintiffs by the District Court to present testimony as to the value of the matter in controversy. In the case of McNutt v. General Motors Acceptance Corporation, the Chief Justice, speaking for the court, recognizes that if the plaintiff's allegations of jurisdictional facts are challenged by his adversaries he must support them by proof. The Court also said:

“ . . . And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.”

Such language places on the District Court either the burden of sustaining plaintiffs' jurisdiction, or allowing plaintiffs in case of challenge an opportunity of proof, or

further in case of no challenge requiring plaintiffs to prove such facts where the court is in doubt. Appellants herein were justified in believing that the Learned Judge in this case, being a long-time resident of the state of Montana, recognized the variation in value between 150 acres of land without water and the value of the same land with the water right and adequate water supply for the irrigation of and production of crops. The court's failure to afford plaintiffs an opportunity to present these facts was not justified by any finding or conclusion contained in his decision of February 8, 1947 (R. 29-37).

We respectfully submit and again urge that the United States District Court for the District of Montana has jurisdiction to hear and determine the issues involved, and that defendants' consolidated motions to dismiss should be overruled.

Respectfully submitted,

SIMMONS & ALLAN,

By Kenneth R. L. Simmons,
Attorneys for Appellants.

Personal service of the within and foregoing brief of appellants and receipt of three copies thereof is hereby acknowledged this day of September, 1947.

H. C. Crippen,
Horace S. Davis,
Rockwood Brown,
Marion B. Porter,
Norman Hanson.

By
Attorneys for Appellees



see vol. 24 7-1937
No. 11642

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

REFRIGERATION ENGINEERING, INC., a corpo-
ration,

Appellant,

vs.

YORK CORPORATION, a corporation,

Appellee.

and

YORK CORPORATION, a corporation,

Appellant,

vs.

REFRIGERATION ENGINEERING, INC., a corpo-
ration,

Appellee.

TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME I

(Pages 1 to 368, Inclusive)

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for the Southern District of California,
Central Division

PAUL P. O'BRIEN

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In the District Court of the United States

Southern District of California

Central Division

Civil No. 4166-PH

YORK CORPORATION,

Plaintiff,

vs.

REFRIGERATION ENGINEERING, INC.,

Defendant.

AMENDED BILL OF COMPLAINT FOR DECLARATORY JUDGMENT ON U. S. PATENT NO. 2,219,393

I.

Plaintiff is a Delaware corporation having its principal place of business at York, Pennsylvania.

II.

Defendant is a California corporation having its principal place of business at Los Angeles, California.

III.

This suit arises out of an actual controversy between the parties; jurisdiction is conferred upon this Court by the Declaratory Judgment Statute, 274d of the Judicial Code (28 U. S. C. A. §400), and by the Patent Laws of the United States.

IV.

Plaintiff has been for many years and is now engaged in the manufacture and sale of refrigerating equipment.

V.

Defendant has asserted and continues to assert ownership of and the right to sue for infringement of United States Letters Patent No. 2,219,393, issued October 29, 1940, on an application filed September 19, 1938. Profert is made of a copy of said patent.

VI.

Plaintiff has been notified, in writing, by defendant's attorneys that plaintiff's manufacture and sale of refrigerating units constitute infringements of said United States Patent No. 2,219,393, and that defendant intends "to hold all parties strictly accountable for the infringement" thereof.

VII.

By reason of such acts and notifications by defendant, plaintiff has been and is being inequitably handicapped and harassed in the conduct of its said business.

VIII.

Plaintiff, upon information and belief, avers that said patent No. 2,219,393 is invalid and void because the applicant therefor was not the original and first inventor of the alleged invention described and claimed therein, but the same, in all its material and substantial parts, was invented, known to and used by others in this country before his alleged invention or discovery thereof; was patented and described in printed publications in this and foreign countries before his alleged invention or discovery thereof, or more than two years prior to his application for patent; and was in public use and on sale in this country for more than two years prior to his said application.

(a) The patents and printed publications above referred to, in so far as they have at present been ascertained, are as follows:

<u>Patentee</u>	<u>No.</u>	<u>Issue Date</u>	<u>Appln. Filed</u>
Newman	389,098	Sept. 4, 1888	Nov. 5, 1887
Brassert	958,471	May 17, 1910	Dec. 9, 1908
Wittenmeier	988,613	Apr. 4, 1911	Oct. 26, 1910
Gayley	1,002,576	Sept. 5, 1911	Jan. 14, 1909
[3]			
Payne	1,045,433	Nov. 26, 1912	Aug. 17, 1910
Jauvert	1,496,676	June 3, 1924	Mar. 31, 1924
Wenzel	2,097,851	Nov. 2, 1937	Apr. 22, 1935
Jensen	Fr.800,640	July 15, 1936	Apr. 12, 1935

Ice and Refrigeration, October, 1907, pages 126-130, article prepared by Ice and Refrigeration entitled "Cooling Public Rooms in a Chicago Hotel".

Ice and Refrigeration, October, 1910, pages 147-151, article prepared especially for Ice and Refrigeration entitled "Refriegation in the Blackstone Hotel".

(b) The instances of prior invention, prior knowledge and use by others, and prior public use and sale, above referred to, in so far as they have at present been ascertained, are as follows:

- (1) The patentees of the patents above set forth in (a), and their respective assignees, licensees and customers, at their respective places of business in the United States.

- (2) Polar Ice & Fuel Co., Indianapolis, Indiana.
- (3) Hayes Brothers, Inc., 236 West Vermont Street, Indianapolis, Indiana.
- (4) Charles E. Martin, 921 College Avenue, Indianapolis, Indiana.
- (5) Illinois Steel Co., South Chicago, Illinois.
- (6) Carnegie Steel Company, Etna, Pennsylvania.
- (7) Northwestern Iron Company, Mayville, Wisconsin.
- (8) Swift & Company, Elmira, New York.
- (9) Trullinger & Eustice Company, Yamhill, Oregon.

Plaintiff further avers that there may be other instances of prior patenting, publication, invention, knowledge and use as yet unknown to plaintiff, of which, when ascertained, plaintiff begs leave to advise the Court by amendment of this complaint. [4]

Wherefore, plaintiff prays:

(a) That a summons issue directed to the defendant commanding it to appear herein and answer the allegations contained in the foregoing complaint and to abide by and perform such orders and decrees as this Court may make in the premises;

(b) That this Court enter a declaratory decree or judgment, adjudging that said United States Letters Patent No. 2,219,393 is invalid and void.

(c) That an injunction issue perpetually enjoining the defendant, its officers, agents and employees, or any of

them, or anyone in privity with them, or any of them, from bringing or prosecuting, or threatening to bring or prosecute, any civil action charging infringement of said Letters Patent No. 2,219,393 against plaintiff, its agents, subsidiaries, vendees or others in privity with it or them;

(d) That this cause be expedited in every way consistent with equity and justice;

(e) That defendant be decreed to pay the costs and disbursements of this suit; and

(f) That the Court grant such other and further relief as shall be just.

YORK CORPORATION

By MESERVE, MUMPER & HUGHES and
H. CALVIN WHITE

By Shirley E. Meserve

Its Attorneys

Of Counsel:

ALEXANDER C. NEAVE of

FISH, RICHARDSON & NEAVE

20 Exchange Place, New York 5, N. Y.

Received a copy of the within amended complaint this 6th day of March, 1945. Lyon & Lyon and Lewis E. Lyon, by Lewis E. Lyon, Attorneys for Defendant.

[Endorsed]: Filed Mar. 7, 1945. [5]

[Title of District Court and Cause]

ANSWER AND CROSS-COMPLAINT OF DEFENDANT, REFRIGERATION ENGINEERING, INC.

Comes now the defendant, Refrigeration Engineering, Inc., and answering the complaint herein and complaining of plaintiff, and for cause of action for infringement of United States Letters Patent No. 2,219,393, states and alleges:

I.

Defendant admits the allegations of paragraphs I, II, III, IV, V and VI of the complaint herein.

II.

Defendant denies the allegation of paragraph VII and denies that by reason of any act or acts or notifications by defendant that plaintiff has been and is being inequitably handicapped and harassed in the conduct of its business. [6]

III.

Defendant denies each and every of the allegations of paragraph VIII of the complaint herein.

Wherefore, defendant, Refrigeration Engineering, Inc., denies that plaintiff is entitled to the relief prayed for in its Amended Bill of Complaint for Declaratory Judgment and prays that the same be dismissed with defendant's costs in this case sustained and for such other and further relief as to the Court may seem just.

CROSS-COMPLAINT FOR INFRINGEMENT OF
LETTERS PATENT NO. 2,219,393

(a) Comes now defendant and cross-complainant, Refrigeration Engineering, Inc., and for cause of action against plaintiff cross-defendant, alleges:

(b) That defendant cross-complainant is a California corporation having its principal place of business in Los Angeles, California, within the Southern District of California, Central Division.

(c) That plaintiff cross-defendant is a Delaware corporation having its principal place of business at York, Pennsylvania.

(d) That the jurisdiction of this Court as to this cause of action arises under the Patent Laws of the United States because of the infringement of United States Letters Patent No. 2,219,393 by plaintiff cross-defendant, and which infringement was carried out by plaintiff cross-defendant within the Southern District of California, Central Division, and elsewhere in the United States.

(e) That on October 29, 1940, United States Letters Patent No. 2,219,393 were duly and legally issued to defendant cross-complainant for an invention for Defrosting Device, [7] and since that date defendant cross-complainant has been, and still is, the owner of those Letters Patent.

(f) Plaintiff cross-defendant has for a long time past been, and still is, infringing those Letters Patent by making, selling and using defrosting devices embodying the

patented invention and will continue to do so unless enjoined by this Court.

(g) Defendant cross-complainant has placed the required statutory notice on all defrosting devices manufactured and sold by it under said Letters Patent and has given written notice to plaintiff cross-defendant of its said infringement.

Wherefore defendant cross-complainant demands a preliminary and final injunction against further infringement by plaintiff cross-defendant, or those controlled by plaintiff cross-defendant, and an accounting for the profits, damages and assessment costs against plaintiff cross-defendant.

LYON & LYON

By Lewis E. Lyon

811 West Seventh St.

Los Angeles 14, California

Attorneys for Defendant, Cross-Complainant,
Refrigeration Engineering, Inc.

Received copy of the within document this 12 day of July, 1945. Meserve, Mumper & Hughes, by Bertoe Dietrich, Attorneys.

[Endorsed]: Filed Jul. 12, 1945. [8]

[Title of District Court and Cause]

ANSWER TO CROSS-COMPLAINT

Comes now plaintiff and cross-defendant, York Corporation, by and through its attorneys of record, and in answer to the cross-complaint on file herein, admits, denies and alleges as follows:

I.

Admits the allegations set forth in paragraph (b) of the cross-complaint.

II.

Admits the allegations alleged and set forth in paragraph (c) of said cross-complaint.

III.

Denies each, all and every of the allegations alleged and set forth in paragraph (d) of said cross-complaint, except that plaintiff and cross-defendant admits that the cause or causes of action in the entitled proceeding arise under the Patent Laws of the United States. [9]

IV.

Plaintiff and cross-defendant denies each, all and every of the allegations contained in paragraph (e) of the cross-complaint on file herein, and in further answer thereto, re-alleges all of the allegations of paragraph VIII of the amended complaint on file herein.

V.

Denies each, all and every of the allegations alleged and set forth in paragraph (f) of the cross-complaint.

VI.

Plaintiff and cross-defendant admits having received written notice from defendant and cross-complainant of alleged infringements of the patent in suit. Plaintiff and cross-defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of cross-complainant as set forth in paragraph (g) of said cross-complaint other than the giving of notice, and on said grounds denies each, all and every of the allegations in said paragraph contained.

Wherefore, plaintiff and cross-defendant prays that the cross-complaint be dismissed with costs to it, and that the court grant such other and further relief as may be just and proper.

MESERVE, MUMPER & HUGHES and
H. CALVIN WHITE

By Shirley E. Meserve

Attorneys for Plaintiff and Cross-Defendant
York Corporation

Of Counsel:

ALEXANDER C. NEAVE of
FISH, RICHARDSON & NEAVE

20 Exchange Place, New York 5, N. Y.

Received a copy of the within answer to cross-complaint this 14th day of August, 1945. Lyon & Lyon, Frederick S. Lyon, Attorneys for Defendant and Cross-Complainant.

[Endorsed]: Filed Aug. 14, 1945. [10]

[Title of District Court and Cause]

OPINION

Oral Opinion of District Court Judge Peirson M. Hall
Delivered September 27, 1946 (Reporter's Transcript
of Proceedings, p. 1518, Lines 9-21)

The Court: From the evidence, and from the law, as I understand it, I think that claim 1 is void, and 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 14. I think 13 is the only claim which has the entire combination for constantly maintaining temperatures in a room below the freezing point of water, and is valid, and that will be the judgment of the court.

As to infringement, I think that I will have to hold that the patent was infringed by the plaintiffs, because if you are correct in your contention concerning infringement, then no claim of the patent would be valid, and I have held claim 13 valid, because it is the only claim which describes all of the elements of the combination. For that reason I will hold that the patent has been infringed. [11]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the conclusion of the trial on September 27, 1946, during and at the conclusion of the oral arguments presented, the Court having expressed its conclusion and opinion, the same by reference, together with and supplemented by the following Findings of Fact and Conclusions of Law, are hereby adopted by the Court as its findings of fact and conclusions of law pursuant to Rule 52 of the Rules of Civil Procedure:

FINDINGS OF FACT

1. Plaintiff, York Corporation, is a Delaware corporation having a place of business at York, Pennsylvania, and filed its complaint for declaratory judgment in this cause of action January 8, 1945. [12]

2. Defendant, Refrigeration Engineering, Inc., is a California corporation having its place of business at Los Angeles, California, and is the owner of all right, title and interest in and to United States Letters Patent No. 2,219,393.

3. An actual controversy existed between plaintiff and defendant with respect to the validity of United States Letters Patent No. 2,219,393 and as to the infringement of said Letters Patent by plaintiff by virtue of plaintiff's manufacture and sale of the defrosting device exemplified by the stipulation, Defendant's Exhibit CC and the structure as therein identified as "Unit sold to private concerns" and the drawings thereto attached

and made a part of such stipulation and illustrating the said unit.

4. That thereafter, to wit, on June 12, 1945, defendant, Refrigeration Engineering, Inc., filed its answer and cross-complaint for infringement of said Letters Patent No. 2,219,393, asserting infringement of said Letters Patent by plaintiff, York Corporation, by virtue of the manufacture and sale of said "Unit sold to private concerns" as exemplified, described and illustrated in the said stipulation, Defendant's Exhibit CC.

5. That thereafter plaintiff filed its answer to said cross-complaint denying infringement of said Letters Patent and asserting invalidity of the said Letters Patent No. 2,219,393.

6. That the patent in suit is predicated upon the discovery of a device for the defrosting of refrigerating coils within a refrigerated space maintained at temperatures below the freezing point of water wherein the means for delivery of the water to and the means for withdrawal of the water from the refrigerating space are self-draining so that the water may be periodically sprayed over the refrigerating coils to remove the accumulated frost therefrom utilizing the specific heat of the water to melt the frost and removing the water from the re- [13] refrigerated space through the said self-draining means in such a manner as to avoid freezing of the water within the refrigerated space.

7. The invention of the patent in suit solved a problem long existent in the refrigerating art by the utilization of water as a means for carrying the heat into the refrigerated space to melt the frost therein, and removing the frost and water from the refrigerated space,

providing a simple, inexpensive and efficient means of solving this problem.

8. That the invention of the patent in suit utilized water at ordinary tap temperatures for defrosting in a manner which was believed by those skilled in the art to be impossible of performance.

9. That upon introduction of the invention of the patent in suit to the art, the engineers in the art did not believe that the device of the McAdam patent in suit would function to defrost coils within a refrigerated space maintained below the freezing point of water and it was necessary for defendant corporation to give guarantees of satisfaction in order to make installations of devices embodying the invention of the Letters Patent in suit.

10. That the teachings of the published art and belief of the engineers in the art prior to the McAdam invention was that water could not be used for the defrosting of coils positioned within the refrigerated space maintained at a temperature below the freezing point of water.

11. That prior to the advent of the McAdam invention of Letters Patent No. 2,219,393 the art had utilized as one method of defrosting a brine spray unit which required the maintenance of a brine solution made up of water and salt such as calcium or sodium chloride which was sprayed over coils in a [14] closed circulation system requiring the operator to maintain a specific concentration of salt within the brine solution during defrosting and a periodical addition of salt to the solution as the solution was diluted by the melting of frost from the coils. Such system was not self-draining and the purpose of the use of the salt was to avoid freezing of the solution containing the salt.

12. That upon introduction of the device of the McAdam patent in suit, and only after proof of its operation by actual demonstration, the art extensively adopted the system of water defrost of the McAdam patent.

13. That the system of water defrost of the McAdam patent in suit superseded other devices for defrosting, making it impossible for plaintiffs to locate a brine spray system to locate to the Court.

14. Defendant has licensed a considerable number of concerns manufacturing and selling refrigeration equipment throughout the United States of America to utilize the invention of the patent in suit.

15. That during the Second World War the different branches of military services specified, with no alternate, this system of water defrost in the manufacture and sale of below freezing refrigeration for use by the Armed Forces, which is admittedly the most satisfactory means which could have been utilized by the Armed Services.

16. That the invention of the McAdam Patent No. 2,219,393 has had wide commercial success after overcoming the initial resistance of the refrigeration engineers and that said commercial success has not in any way been due to advertising by defendant.

17. The prior art does not disclose any knowledge of the use of a system of defrosting utilizing water within a [15] refrigerated space maintained below the freezing point of water but, on the contrary, the teaching of the prior art is that water could not be so used.

18. That it required the exercise of inventive faculty to invent the combination as defined by Claim 13 of the Letters Patent No. 2,219,393.

19. That the combination disclosed and defined in and by Claim 13 of Letters Patent No. 2,219,393 was novel and useful and that the said claim is not anticipated by anything existing in the prior art.

20. That plaintiff has not sustained the burden of proof of establishing either prior manufacture, use, sale or knowledge of the invention of the McAdam patent in suit.

21. In the Gayley dry blast process, the subject of the depositions taken in Pittsburgh, Pennsylvania, and Chicago, Illinois, it is not established that the systems were self-draining, but on the contrary the pipes for spraying water over the coils were horizontally disposed as were the pipes leading into and from the chamber containing the said coils.

22. In the Gayley dry blast process, it is not established that the temperatures within the chambers containing the coils were maintained below the freezing point of water, but, on the contrary, it is established that the temperatures within the chambers during the period of defrosting were above the freezing point of water.

23. In the Gayley dry blast process, it is established that in order to avoid maintaining the chambers containing the coils below freezing, refrigerant was withdrawn from the coils before defrosting and that the temperature of the refrigerant so withdrawn was above the freezing point of water. [16]

24. In the Gayley dry blast process it is established that the time required for defrosting the coils in the Gayley system was such as to permit the temperature of the space containing the refrigerating coils to rise above the freezing point of water.

25. In the Gayley dry blast process it is established that there is not provided a refrigerating coil positioned within a refrigerated space which is required to be maintained below the freezing point of water.

26. In the Gayley process during defrosting the refrigerating coils were effectively isolated from the refrigerating system by the closing of doors to prevent the circulation of air and this made certain that the temperature within the space containing the coils would rise above the freezing point of water.

27. That the use of the Gayley process did not teach the refrigeration art that water could be utilized for defrosting refrigerating coils positioned within a refrigerated space maintained at temperatures below the freezing point of water.

28. That the installation known as the "Polar Ice installation" and concerning which the depositions were taken in Indianapolis, Indiana, does not anticipate the Letters Patent in suit and does not disclose the invention thereof.

29. That the installation, the subject matter of the depositions taken in Indianapolis and referred to as the "Polar Ice installation" was not so constructed as to provide for self-draining of the water but, on the contrary, it was established that the pipes were so installed as to prevent self-draining.

30. That the installation, the subject matter of the depositions taken in Indianapolis and referred to as the "Polar Ice installation" was not used, nor was it adapted for use, within a refrigerated space maintained below the freezing point of water. [17]

31. The installation, the subject matter of the depositions taken in Indianapolis and referred to as the "Polar Ice installation" was discarded and abandoned and no other like system was ever installed or used by those interested in or instrumental in its construction and attempted use.

32. The depositions taken at Indianapolis concerning the "Polar Ice installation" do not establish prior invention, manufacture, use or sale of a water defrosting system anticipating the invention of the McAdam patent in suit.

33. The depositions taken at Elmira, New York, concerning the Swift & Company installation do not establish prior manufacture, use, sale or knowledge of the invention of the McAdam Patent No. 2,219,393 in suit.

34. The depositions taken at Elmira, New York, concerning the Swift & Company installation do not establish the use of a system of water defrosting in a refrigerated space maintained below the freezing point of water.

35. The depositions taken at Elmira, New York, concerning the Swift & Company installation do not establish that the system was self-draining but, on the contrary, establish that the system as installed and used was not self-draining.

36. That the depositions taken at Elmira, New York, concerning the Swift & Company installation established that Swift & Company operated a below freezing storage room for holding meat at temperatures below the freezing point of water and that in connection with such installation, Swift & Company did not use the system of

water defrosting as disclosed in the McAdam patent in suit, but utilized a different system of defrosting refrigerating coils within the room which required removing all frozen products from the room permitting temperature of the room to rise above the freezing point of water during defrosting. [18]

37. In the depositions taken at Portland, Oregon, and concerning which installation the witness W. C. Hulse, testified before this Court, and referred to as the "Yamhill installation", it is not established that said installation was either made, used or sold, or that those taking part in the said installation or use had knowledge of the invention of the McAdam patent in suit, No. 2,219,393.

38. It is established that the said "Yamhill installation" was an abandoned experiment which was never repeated, no like installation was ever made by those interested in this attempted use and did not teach the art the system of water defrost as set forth in the McAdam Patent No. 2,219,393.

39. In conjunction with the refrigeration machinery installed at Yamhill, Oregon, several different methods of defrosting were attempted unsuccessfully and later abandoned, with the result that the system now utilized at Yamhill, Oregon, was the older system of hot air defrosting requiring the blowing of air over the coils to melt the frost therefrom, which results in a rise in temperature of the refrigerated space.

40. In conjunction with the different methods of defrosting attempted to be used at Yamhill, Oregon, it is established that during attempts to utilize water for defrosting the refrigerating coils were positioned outside of the refrigerated space.

41. In conjunction with the several different methods of defrosting which were attempted to be used at Yamhill, Oregon, it is not established that the temperature within the space in which the refrigerating means were operated was maintained below the freezing point of water.

42. In conjunction with the Yamhill installation, it is established that the attempt to use water for the purpose of defrosting was unsatisfactory. [19]

43. It is established that the refrigeration machinery installed at Yamhill, Oregon, was not paid for by the owners thereof, Eustice and Trullinger, during the attempt to utilize water for the purpose of defrosting.

44. While water was attempted to be used at the Yamhill, Oregon, installation, it is established that the refrigerated coils were isolated from the refrigerated space of the Eustice and Trullinger locker room during attempts to defrost the coils thereof by closing doors over the inlet and outlet to the coil containing space with the result that the temperature within the coil housing was not maintained below freezing during defrosting.

45. In conjunction with the Yamhill installation, it is established that the attempt made to utilize water for defrosting of this system was forgotten by those interested in the installation, that a similar installation was never made at any other place, although the witnesses who testified concerning this attempted installation testified that the problem of defrosting still remained acute after such installation was discontinued.

46. In conjunction with the Yamhill installation, it is not established when the attempt was made to utilize water for defrosting or when the attempt was discon-

tinued, but it appears that the records of both of these facts were in possession of plaintiff's witnesses and were not produced by plaintiff.

47. In conjunction with the Yamhill installation, the Court finds that the witness, W. C. Hulse's testimony was not worthy of belief and the Court observed his manner and demeanor while giving his testimony before the Court, and his testimony was found to be impeached upon material grounds. [20]

48. That claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 of the McAdam patent in suit do not define the complete invention as disclosed therein.

49. That Claim 13 of the McAdam Patent No. 2,219,393 in suit defines the invention made by McAdam disclosed in said Letters Patent in suit.

50. That it was stipulated by counsel for plaintiff and defendant that under the provisions of Section 68 U. S. C. Title 35, that this Court does not have jurisdiction to determine the question of infringement of the structures manufactured and sold to the United States Government as such structures are identified and set forth under the title of "Description of Government Sales, Unit V-30" in the stipulation, Defendant's Exhibit CC.

CONCLUSIONS OF LAW

1. That Letters Patent in suit were duly and legally issued on October 29, 1940, to Refrigeration Engineering, Inc., defendant, and that defendant is the owner of the entire right, title and interest in and to the Letters Patent in suit, together with any and all rights of action, claims or demands arising out of or accruing from past infringement thereof.

2. The patent in suit is good and valid in law as to Claim 13 thereof, and covers a new and meritorious invention entitling the patent to a liberal interpretation.

3. Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 of the Letters Patent in suit are invalid as not defining the entire invention of the McAdam patent.

4. Plaintiff has infringed Claim 13 of the Letters Patent in suit by the manufacture and sale of the "Unit sold to private concerns" as exemplified by and set forth in the stipulation, Defendant's Exhibit CC. [21]

5. That defendant is entitled to a judgment for an injunction and accounting with costs and attorney's fees as prayed for in defendant's cross-complaint filed herein.

6. That the injunction and accounting should be stayed pending appeal by plaintiff from the judgment entered herein and until said appeal is determined, dismissed, or until the time for such appeal has lapsed.

PEIRSON M. HALL

United States District Judge

Mar. 7

Dated: ~~October~~ 24, 1946.

Approved as to Form as provided in Rule 8.
....., Attorneys for Plaintiff; Lyon & Lyon,
by Lewis E. Lyon, Attorneys for Defendant.

Due service and receipt of a copy of the within Findings of Fact & Concl. of Law is hereby admitted this 21st day of October, 1946. Meserve, Mumper & Hughes and Alexander C. Neave, by Shirley E. Meserve, Attys. for Plaintiff.

[Endorsed]: Lodged Nov. 7, 1946.

[Endorsed]: Filed Mar. 24, 1947. [22]

In the United States District Court
Southern District of California
Central Division

Civil Action No. 4166-PH

YORK CORPORATION,

Plaintiff,

vs.

REFRIGERATION ENGINEERING, INC.,

Defendant.

JUDGMENT

This cause having come on to be heard, and the Court having made and entered its Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Rules of Civil Procedure, it is hereby Adjudged and Decreed as follows:

(1) That defendant is the owner of the entire right, title and interest in and to Letters Patent No. 2,219,393, granted October 29, 1940, to Harry McAdam, for Defrosting Device, together with all rights of action for past infringement thereof.

(2) That said Letters Patent, and Claim 13 thereof, is good and valid in law.

(3) That Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 of said Letters Patent are invalid and void as failing to define the entire combination of the invention of the McAdam patent. [23]

(4) That the Complaint herein be dismissed.

(5) That defendant have judgment on its Cross-Complaint for infringement of Letters Patent No. 2,219,393 as prayed for.

(6) That a perpetual injunction be issued out of and under the seal of this Court, restraining the plaintiff, its officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, from using or causing to be used, or offering or threatening to use, or contributing to the use of, the devices patented in and by said Letters Patent No. 2,219,393, and particularly Claim 13 thereof, reading as follows:

“13. In combination with a refrigerated space, a coil adapted for periodic defrosting, a spray-head positioned to distribute water over said coil for defrosting thereof, a fan to move air of said space over said coil adapted to be discontinued during defrosting periods whereby the air of said space does not rise above the freezing point of water during the defrosting period, a drip pan disposed below said coil to receive water and ice gravitating from said coil, a self-draining conduit leading from said drip pan to points remote from said space, and an inclined water supply conduit leading from a point remote from said space to said spray-head; said water supply conduit at said remote point provided with an opening normally open to the atmosphere whereby the conduit and spray-head respectively are self-draining, and means for periodically supplying water to said supply conduit during period when said fan is inoperative.”

and from in any way infringing upon said Letters Patent or upon the rights of the defendant under said Letters Patent.

(7) That defendant recover from the plaintiff [24] general damages which shall be due compensation for

making, using, or selling the invention not less than a reasonable royalty therefor, together with such costs and interest as may be fixed by the Court and together with reasonable attorney's fees to be determined by the Court.

(8) That this cause be referred to David B. Head, Esquire, as a Special Master, to take and report to the Court an account of the said compensation due defendant and determine reasonable attorney's fees to be allowed defendant in this cause.

(9) That defendant recover its costs herein from plaintiff in the amount of \$744.70 to be taxed.

(10) That the injunction provided for in Paragraph 6 hereof, and that the accounting and reference for accounting as provided for in Paragraphs 7 and 8 hereof, be stayed pending appeal by plaintiff of this judgment or for the statutory period of time within which such appeal may be taken and if taken, until the determination of this cause by the Appellate Court or the dismissal of the said appeal.

PEIRSON M. HALL

United States District Judge

Mar. 7

Dated: ~~October~~ 24, 1946.

Approved as to Form as provided in Rule 8.
, Attorneys for Plaintiff. Lyon & Lyon,
 by Lewis E. Lyon, Attorneys for Defendant.

Judgment entered Mar. 24, 1947. Docketed Mar. 24, 1947. C. O. Book 42 page 276. Edmund L. Smith, Clerk; by J. M. Horn, Deputy.

[Endorsed]: Lodged Nov. 7, 1946.

[Endorsed]: Filed Mar. 24, 1947. [25]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that Refrigeration Engineering, Inc., defendant-cross-complainant, hereby appeals to the Court of Appeals for the Ninth Circuit from the parts of the Judgment entered in this action on March 24, 1947 which adjudges:

“(3) That Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 of said Letters Patent are invalid and void as failing to define the entire combination of the invention of the McAdam patent.”

Dated: April 22, 1947.

LYON & LYON

By Lewis E. Lyon

Attorneys for Appellant

Due service and receipt of a copy of the within Notice of Appeal is hereby admitted this 22nd day of April, 1947. Meserve, Mumper & Hughes, by Shirley E. Meserve, Attys. for Plaintiff.

[Endorsed]: Filed & mld. copy to Meserve, Mumper & Hughes & H. Calvin White Apr. 22, 1947. [26]

[Title of District Court and Cause]

PLAINTIFF'S NOTICE OF APPEAL

Plaintiff, York Corporation, hereby files notice, this 23rd day of April, 1947, that it appeals to the United States Circuit Court of Appeals for the Ninth Circuit from paragraphs numbered (2) and (4) to (9) inclusive of the Judgment entered herein on March 24, 1947.

MESERVE, MUMPER & HUGHES and
H. CALVIN WHITE

By Shirley E. Meserve

Attorneys for Plaintiff.

Of Counsel:

ALEXANDER C. NEAVE of

FISH, RICHARDSON & NEAVE

20 Exchange Place, New York 5, N. Y.

Received copy of the within Plaintiff's Notice of Appeal this 22nd day of April, 1947. Lyon & Lyon, by, Attorneys for Defendant.

[Endorsed]: Filed & Mld. copy to Lyon & Lyon (Lewis E. Lyon) Apr. 23, 1947. [27]

[Title of District Court and Cause]

CORRECTED STIPULATED DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

It Is Hereby Stipulated and Agreed, subject to the approval of the Court, that the following shall constitute the record on appeal: [28]

* * * * *

It is hereby further stipulated and agreed that the District Court, pursuant to Rule 75(i), be requested to enter an order that the original exhibits herein designated should be available for inspection by the Appellate Court and should therefore be sent to the Appellate Court in lieu of copies, and that the District Court may upon this consent make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

It is further stipulated that this Corrected Stipulated Designation of Contents of Record on Appeal may be substituted for and in place of the stipulation heretofore entered dated April 22, 1947.

Dated: May 20, 1947.

MESERVE, MUMPER & HUGHES and
H. CALVIN WHITE

By Shirley E. Meserve
Attorneys for Plaintiff

LYON & LYON

By Lewis E. Lyon W

Attorneys for Defendant

Of Counsel:

ALEXANDER C. NEAVE of
FISH, RICHARDSON & NEAVE

20 Exchange Place, New York 5, New York

[Endorsed]: Filed May 22, 1947. [29]

[Title of District Court and Cause]

ORDER WITH RESPECT TO STIPULATED
DESIGNATION OF CONTENTS OF REC-
ORD ON APPEAL

On motion of the parties hereto, it is Ordered as follows:

1. The attached Stipulated Designation of Contents of Record on Appeal is hereby approved.

2. All original exhibits in this case shall be duly certified by the Clerk of this Court and sent to the Appellate Court in lieu of copies as part of the record on appeal as requested in said Stipulated Designation.

Apr.

Dated ~~May~~ 23, 1947.

PEIRSON M. HALL
U. S. D. J.

Approved as to form: Shirley E. Meserve, Attorney for Plaintiff; Lewis E. Lyon, Attorney for Defendant.
4-22-47.

[Endorsed]: Filed Apr. 24, 1947. [30]

[DOCKET ENTRIES]

4166-PH Docket

Title of Case York Corporation v. Refrigeration Engineering, Inc.

Attorneys

For Plaintiff: Meserve, Mumper & Hughes and H. Calvin White

For Defendant: Lyon & Lyon, Lewis E. Lyon

For declaratory judgment on patent

Date	Plaintiff's Account	Received	Disbursed
1- 8-45	Meserve, Mumper & Hughes	16.00	
4-11-45	Trea's T 4		15.50
4-23-47	Cromwell Warne, Jr.	5.00	

Date	Defendant's Account	Received
4/27/47	Lyon & Lyon—Not. App.	5.00

Date	Filings—Proceedings
1/ 8/45	Fld compl for declaratory jgt re patent. Issd summons, Made Report J. S. 5. Md. patent report to Comr Patents. Clerk's Fees, Plaintiff 15.50
1/39/45	Fld dfts mot for b/p with not mot ret 2/26/45 & pts & auths.
2/21/45	Fld plf's memo in oppos to dft's mot for particulars. Fld affd of serv.
2/26/45	Ent procs & ord cont to 4/30/45, 10 AM on stip of counsel for hrg on mo of deft for B/P.

Date	Filings—Proceedings
3/ 7/45	Fld amended compl.
3/13/45	Fld stip & ord thereon plfs amended compl. be fld; mot for partic be deemed directed to amend compl; & deft hv to & inc 20 days aft serv B/P or denial to plead.
3/16/45	Fld. stip & ord allow flg of amend compl, etc. & ext dft's time to plead to amend compl to 20 days aft plf has serv & fld b/p or mot for b/p is denied.
3/20/45	Fld depos of F. C. Barton, et al & plf's exhs 13 to 29 incl & dft's exh A.
3/21/45	Fld depos of Louis V. Smith, et al & plf's exhs 38 to 42 incl, 43-A & 43-B, 44 & 45. Amount Reported in Emoulment Returns 15.50.
4/27/45	Fld stip & ord thereon hrg mot deft for partic be contd to 5/14/45.
5/14/45	Ent procs & ord cont to 5/28/45, 10 AM for hrg on deft's mo for B/P.
5/26/45	Fld not withdrawal by deft of mot for B/P.
5/28/45	Ent procs & ord striking from cal hrg on deft's mo for B/P.
6/ 6/45	Fld stip & ord ext time dft to ans to & incl 6/23/45.
7/ 3/45	Fld depositions Frank C. Bauer, A. Raphael Kernan, Jesse O. Brandt, William Swope, Edward G. Kennedy, Edward Harkins, taken on behalf plf 2/9/45; & fld exhs to depos 1, 2A, 2B, 3, 4, 5, 6A, 6B, 7, 8, 9, 11, 12. [33]

Date	Filings—Proceedings
7/ 6/45	Fld plfs exh 10 to depositions Frank C. Bauer et al htf fld on 7/3/45.
7/12/45	Fld <u>answer</u> & Cross-compl deft Refrigeration Engineering, Inc.
7/27/45	Fld depositions of Nicholas L Tominac, Albert Gaide, Herman L. Lietz, Alfred E. Mueller, tkn at Chicago, Ill., Feb. 16, 17, 1945. with Plf's exhs. 30, 30-A, 31, 32, 33, 34, 35, 36-A-I & 37 thereto.
8/14/45	Fld plfs. <u>answer</u> to cross-compl.
8/18/45	Fld not takg deposition F. L. Trullinger et al.
9/10/45	Ent procs & ord cont to 10/8/45, 10 a. m., for settg for trial.
10/22/45	Ent procs & ord striking from cal.
11/10/45	Fld in 1 vol depositions Fred L. Trullinger, C. W. Eustice, Anton Broms, Mark A. Postlewaite, taken beginning 8/21/45. Fld plfs exs Y-1 to 27 inc with depositions.
12/10/45	Fld summons ret unexecuted.
2/ 4/46	Ent procs & ord settg for trial 5/21/46. 10 AM and for pretrial hrg 3/11/46, 2 PM.
2/20/46	Ent ord vacating pre-trial date 3/11/46 & trial date 5/21/46 & contg to 5/6/46, 10 AM for re-settg. Mld copies of M/O to counsel.
3/15/46	Fld stip of facts.
5/ 6/46	Ent. procs & ord settg for trial on 9/17/46, 10 AM. Counsel waive notice.

Date	Filings—Proceedings
8/ 9/46	Fld not of takg depos of C. W. Hulse, tkn 8/20/46.
8/16/46	Fld stip and ord that plf's exbs Y-1 and Y-27 incl. be removed from files for use of plf's counsel for tkg depos.
9/ 5/46	Fld plf's pre-trial brief.
9/16/46	Fld deft's pre-trial brief.
9/17/46	Ent proc on trial & ent ord cont to 10 AM 9/18/46 for fur trial. Sw 1 deft's wits. Fld 20 defts exbs. Fld 1 plf's exb.
9/18/46	Ent procs for trial & ent ord cont to 9/19/46, 10 AM for fur trial. Sw 7 wits. for deft & cross-clmt. Fld 11 deft & cross-clmt's exbs. [34]
9/19/46	Ent procs fur trial & ent ord cont fur trial herein to 10 AM 9/20/46. Sw 2 deft & cross-clmts. wits. Fld 1 defts exb. Read depos of 3 plf's wits.
9/20/46	Fld depos of C. W. Hulse tkn 8/20/46 & plf's exb Y-28 thereto. Fld depos of C. W. Hulse, tkn 8/23/45. Ent procs on fur trial & ent ord cont to 10 AM 9/24/46 for fur. procs on trial. Read depos of 11 wits into record. Fld 38 exbs of plf.
9/24/46	Ent procs fin. trial & ent ord cont to 10 AM 9/25/45 for fur trial. Read depos of 6 wits. in behalf of plf.

Date	Filings—Proceedings
9/25/46	Ent procs fur trial & ent ord cont to 10 AM 9/26/46 for fur. procs on trial. Read depositions of 2 wits. for plf. Sw 3 plf's wits. Fld 27 exbs for plf.
9/26/46	Ent procs fur trial & ent ord cont to 10 AM 9/27/46 for fur procs on trial. Fld 7 plf's exbs. Sw 2 deft's re-buttal wits. Sw 1 plf's rebuttal wit. Fld 2 defts exbs.
9/27/46	Ent procs fur trial & ent ord that judgmt be ent to the effect that Claims 1 to 12, incl & claim 14 are void, that Claim 13 is valid, & that pat in suit has been infringed by plf. Ent fur ord susp accountg until dispos of appeal, that counsel for deft & cross-claimt. prepare formal Findings of Fact & Conclusions of Law & Decree, servg. same upon plf as expeditiously as possible & that plf have 30 days after service thereof in which to file its objecs. thereto & that provisions for injunctive relief be susp until final dispos of appeal or appeals. Fld list of Exhibits.
9/30/46	Fld. rptrs. trans. of proceedgs on trial dtd 9/17/46; 9/18/46; 9/19/46; 9/20/46; 9/24/46; 9/25/46; 9/26/46; 9/26/46; 9/27/46.
10/ 3/46	Fld rptrs trans of proc dtd 9/17/46 to 9/27/46 incl. of trial, dup heretofore fld 9/30/46.
11/ 7/46	Lodged Findgs of Fact and Concls of Law. Lodged jdmt.

Date	Filings—Proceedings
11/13/46	Fld stip and ord extendg time of plf to prepare, serve and present its objs to defts findgs of fact and concls of law and jdmt and to prepare, serve and present its proposed findgs of fact and concls
11/13/46	(Continued) of law and jdmt to & includg 11/30/46.
11/29/46	Lodged Plf's proposed findings, concls and judg.
1/27/47	Fld as of 1-21-47 plf's memo on findings of fact & concls law.
3/24/47	Ent ord flg & fld Findgs of Fact & Concls of Law & fld & ent COB 42/276 Jgmt purs thereto that deft is owner of entire right, title, & int in & to Letters Pat #2,219,393, together with all rights of action for past infringement thereof; that Clm 13 thereof is good & valid in law; t at Clms 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, & 14 thereof are invalid & void; that compl be dismed; that deft hv jgmt on its cross-compl for infring of said Letters Pat.; that a perpetual injunc be issd restrng plf, etc & partic Clm 13 thereof that deft recover from plf gen dmges due for making, selling, & using invention not less than a reasonable royalty therefor, together with costs & int as may be fixed by Court &

Date	Filings—Proceedings
	reasonable attys fees to be determ by Court, that this case be referred to David B. Head, U. S. Comr, to take & rept to Court an account of compensation due deflt & determ reasonable attys fees; that deflt recover its costs herein from plf. that inj be stayed pendg appeal & if appeal tkn, until determ of appeal by CCA or the dimisl thereof. Dktd same. Made Report J. S. 6.
3/29/47	Fld stip & ord ent time to file cost bill to & incl 4-15-47.
4/15/47	Fld deflt's memo of costs & disbursmts.
4/18/47	Fld ord re atty's fees as costs. Taxed costs favor dft at \$744.70. Dock & ent same.
4/22/47	Fld not of appeal by deflt-cross-compl, mld cpies to Meserve, Mumper & Hughes & H. Calvin White. Fld stip for costs & bond on appeal.
4/23/47	Fld plfs not of appeal, mld copy to Lyon & Lyon attys for deflt. [35]
4/24/47	Fld ord with resp to stip desig of contents of rec on appeal of dft-applnt. Fld stip desig of contents of rec on appeal.
4-25-47	Fld. plf. appellant's undertakg. for costs on appeal.
5/16/47	Fld stip & ord correctg rpters trans of proceedgs. [36]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 36 inclusive contain full, true and correct copies of Amended Bill of Complaint for Declaratory Judgment on U. S. Patent No. 2,219,393; Answer and Cross-Complaint of Defendant, Refrigeration Engineering, Inc.; Answer to Cross-Complaint; Page 1518, Lines 9-21 of the Reporter's Transcript; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Plaintiff's Notice of Appeal; Corrected Stipulated Designation of Contents of Record on Appeal; Order with Respect to Stipulated Designation of Contents of Record on Appeal; Stipulation and Order re Reporter's Transcript and Docket Entries which, together with Original Reporter's Transcript and Original Exhibits, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$6.10, one-half of which has been paid by each of the parties.

Witness my hand and the seal of said District Court this 29 day of May, A. D. 1947.

(Seal)

EDMUND L. SMITH.

Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable Peirson M. Hall, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS
ON TRIAL

Los Angeles, California, September 17, 1946

Appearances:

For the Plaintiff: Meserve, Mumper & Hughes, and
H. Calvin White, 555 South Flower Street, Los Angeles
13, California; by Shirley Meserve, Esq. Fish, Richard-
son & Neave, 20 Exchange Place, New York 5, New
York; by Alexander C. Neave, Esq., and William J.
O'Hearn, Jr.

For the Defendant: Lyon & Lyon, 811 West Seventh
Street, Los Angeles 14, California; by Lewis E. Lyon,
Esq., and Charles G. Lyon, Esq. [2*]

* * * * *

Mr. Lewis Lyon: I will at this time offer in evidence
as Defendant's Exhibit A, a copy of the Harry H. Mc-
Adam patent, No, 2,219,393, granted October 29, 1940,
for defrosting device. [11]

* * * * *

The Court: That is in evidence as Defendant's Ex-
hibit A.

(The patent referred to was received in evidence and
marked Defendant's Exhibit A.) [12]

[Note: Defendant's Exhibit A will be found in the
Book of Exhibits at page 1483.]

* * * * *

*Page number appearing at top of page of Original Reporter's
Transcript.

H. T. JARVIS,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: H. T. Jarvis.

The Clerk: And your address?

The Witness: 6107 South Central.

The Clerk: Los Angeles?

The Witness: That is right.

Mr. Lewis Lyon: Does your Honor desire the examination of the witnesses to be made from the pulpit. I find myself very nervous and I usually walk all over the room.

The Court: I have found that it is preferable because a person in talking to another has a tendency to talk loud enough for the other person to hear, but if you creep up here I find everyone has to ask the witness to repeat, and so [44] forth. If you will stand back there, you can hear him, and if you do not, you will remind him to talk loud enough.

I realize that there are times when you have to come up here to the diagrams and so on.

Mr. Leonard Lyon: Very well, your Honor.

Direct Examination

By Mr. Lewis Lyon:

Q. What is your business, Mr. Jarvis?

A. At the present time, manufacturing refrigerator coils of all types.

Q. You are an officer of Refrigeration Engineering, the defendant corporation, are you? A. I am.

(Testimony of H. T. Jarvis)

Q. What office?

A. Vice president, general manager, and treasurer.

Q. Will you state briefly, Mr. Jarvis, your training and experience in the refrigeration art?

A. To do that I believe it might be necessary to state that I have been in the refrigeration business continually since 1937. Early in 1937 I started selling household refrigeration and graduated into apartment house type and commercial type of various applications, and until 1932 when this corporation was formed, at which time we started in to manufacture coils.

Q. You mean in 1927. [45] A. Yes, sir.

The Court: You said 1937 you began to sell refrigerators.

The Witness: I beg your pardon. It was 1927; yes, sir.

By Mr. Lewis Lyon:

Q. Proceed.

A. As I stated, I have been in the industry ever since 1927 and believe I have had experience in practically every phase of all refrigeration, as it is commonly installed today.

Q. Did you have anything to do with the formation of the defendant corporation? A. I did.

Q. When was that corporation formed?

A. I believe it was July 1932.

Q. What was the business of that corporation when it was formed?

A. The same as it is today, manufacturing of nothing but coils.

(Testimony of H. T. Jarvis)

Q. By "coils" you mean the evaporator unit of a refrigeration system?

A. Yes, sir. Coils is an industry name, and I think evaporators is the true technical name. That covers everything from a household type coil to an air conditioning coil, [46] both for high and low temperatures.

The Court: When you say "coil" you mean the entire unit? You don't mean just the things through which the fluid or gas flows?

The Witness: A coil in my terminology means a complete coil such as in your household refrigerator, with the tubes inside of the finned assembly in many instances, or plate assembly. That is a self-contained unit in which the ice trays are put.

The Court: It is a complete refrigerating unit?

The Witness: Yes, sir. In the case of the present-day blower type of coil, it is a complete unit, complete with fan and motor and necessary valves.

By Mr. Lewis Lyon:

Q. It does not, however, include the compressor or the cooling element for cooling the gas which goes to make up a complete refrigeration unit?

A. No, sir, it is only a component. There are two major components, the coil is one and the compressor is the other and the condenser is the third.

Q. What particular types of such coils does your company manufacture?

A. We manufacture household evaporators. We manufacture showcase or meat case coils. We manufacture reach-in refrigeration coils, both for high and low temperature, [47] walk-in coils, both for high and low

(Testimony of H. T. Jarvis)

temperature. We manufacture air conditioning coils in limited quantities, and we manufacture a line of evaporative condensers which is in reality a coil for replacing an old-fashioned air-cooled condenser.

Q. Are those all fin type coils?

A. Practically, yes. There are a few plain type coils used in a few meat cases up to the present time.

Q. What is a fin type coil? Will you explain it?

A. I will attempt to. A fin type coil in our industry means a series of pipes, usually copper pipes or steel pipes, on which there is a metal fin usually stamped through a punch press operation, and these fins are spaced on these tubes. In other words, the fin is dropped over a series of, say, four tubes, and there are spacers that keep them a quarter of an inch apart or half an inch apart or one inch apart. Then there is a mandrel drawn through the pipe after the fins are put in place that internally expands the tube in sufficient diameter to make a bond between the pipe and the fin which acts as a transfer of heat from the air to the tube and thence to the refrigerant and back to the condenser.

Q. What is the purpose of the fins, to add additional heat transfer surface?

A. Yes, sir, it is, and because it is much more [48] economical to supply fins than the great amount of bare pipe coil that it would take to do the same job.

Q. Prior to 1937, Mr. Jarvis, your company, in manufacturing and installing these units, of necessity had to recommend or provide some method of defrosting those units, is that correct?

A. I am sorry, Mr. Lyon. I am confused on the date.

(Testimony of H. T. Jarvis)

Q. Prior to 1937.

A. Would you read that back, please?

(The question referred to was read by the reporter, as follows:

("Q. Prior to 1937, Mr. Jarvis, your company, in manufacturing and installing these units, of necessity had to recommend or provide some method of defrosting those units, is that correct?")

The Witness: That is correct.

By Mr. Lewis Lyon:

Q. At that time what methods of defrosting were generally used in the industry?

A. There were a number of methods, namely, the brine spray unit, the hot gas defrost unit, the electric defrost unit. Those were the three most commonly used. There were some instances where manufacturers attempted to defrost with electric light globes and other means of heating.

Q. Was there or was there not the problem of defrost-[49] ing refrigeration units a major problem in the art of refrigeration at that time?

Mr. Neave: I object to that, your Honor. That is a conclusion on the part of the witness, not a fact.

The Court: Is this witness offered as an expert?

Mr. Lewis Lyon: He is offered from his experience as a manufacturer as an expert in that regard; yes, your Honor.

The Court: You are asking now his opinion?

Mr. Lewis Lyon: Yes, your Honor.

The Court: Objection overruled. [50]

(Testimony of H. T. Jarvis)

The Witness: A. From the day that I first became acquainted with the refrigeration industry, and to my knowledge, it was the biggest problem that the industry had to solve before the present-day frozen food industry could begin to travel.

Q. By Mr. Lewis Lyon: With what types or methods of defrosting were you personally acquainted in 1937, Mr. Jarvis?

A. Every type that I mentioned a few moments ago, namely, electric, and brine, and hot gas methods.

Q. Had you made a study of the operation of each of those systems? A. I did, in many cases.

Q. State whether or not it was as a result of your knowledge of the problems of this art that the invention of the patent in suit was developed?

A. Would you please repeat that question?

Q. Read it, please.

(The question was read.)

A. Yes, I am sure it was.

Mr. Neave: Your Honor, I must object.

The Court: Objection sustained. I don't know what your ground is, but the objection is sustained, and the answer stricken.

Q. By Mr. Lewis Lyon: When was the water defrosting system of the McAdam patent in suit first developed, Mr. Jarvis? [51] A. During 1937.

Q. Did you have anything to do with the development of that invention?

A. Only to the extent of delegating to the chief engineer the job of figuring out some means of doing the job, other than the existing methods at that time.

The Court: McAdam,—is that McAdam?

(Testimony of H. T. Jarvis)

The Witness: McAdam, yes, your Honor.

The Court: He is your chief engineer?

The Witness: Your Honor, that is true.

Mr. Neave: May I ask counsel a question?

The Court: You may.

Mr. Neave: Mr. Lyon, we have a stipulation on the dates of conception.

Mr. Lewis Lyon: I am not going to disturb that stipulation.

Mr. Neave: You are going to offer it?

Mr. Lewis Lyon: I haven't offered it yet.

Mr. Neave: I just wanted to make clear—

The Court: Are you going to offer it? Is it written?

Mr. Leonard Lyon: Yes, it is.

Mr. Neave: Yes, it is a written stipulation.

Mr. Leonard Lyon: I can offer it at a later time, your Honor. I do not have it available here. I have no objection to its being offered, and will offer it. [52]

Q. By Mr. Lewis Lyon: After the development of this method of water defrosting, will you explain, Mr. Jarvis, what you personally did to introduce this method of defrosting into the art of refrigeration?

A. Mr. Lyon, that is a long story, and, your Honor, I will attempt to be as brief as possible, and state that the first opportunity that presented itself to use this method was in the State of Oregon, and I recommended it to a locker plant to maintain zero degrees. We made four coils and shipped them to the job in question, and shortly after the job was installed I made a trip to the job site, and inspected the installation and found that we hadn't entirely solved the problem. Either through our shop, or the drawings had not been followed, or there was some-

(Testimony of H. T. Jarvis)

thing in the installation which caused three coils out of the four to not defrost properly. On careful examination I found that the water was trapped in the supply line leading to the coils in three instances, and in the fourth instance the coil would drain properly and the next day, when they tried to defrost it, the one coil would operate satisfactorily and the other three coils—well, it was necessary to go into the room with a blow torch and melt the ice inside of the supply pipe that had frozen.

That correction was made on the job by myself, and so far as I know, the job has functioned satisfactorily ever since.

The Court: When you say correction, do you mean that that [53] complied with the disclosures of the patent?

The Witness: That is correct, your Honor, and lowered the supply lines so that when the water supply was discontinued, the drain-back through the law of gravity was completed, leaving no water in the pipe to freeze.

The Court: The fault was there was not a sufficient difference between the elevation of the line and the pan of the drain pipe?

The Witness: The drain pan and the supply line, yes, sir.

Q. By Mr. Lewis Lyon: Now, following your experience with that Woodland, Oregon, job, Mr. Jarvis, I believe that you were called upon to demonstrate the operation of the water defrost at a public gathering at San Francisco; is that correct? A. That is correct.

Q. What was that gathering?

A. That gathering was a National Association of Practical Refrigeration Engineers, and they were holding,

(Testimony of H. T. Jarvis)

I believe, their national convention in San Francisco at that time.

Q. Do you recall the date of that meeting, Mr. Jarvis?

A. I am sorry, I don't believe I could call the exact date without referring to the records that I turned over to you.

Q. While I am looking for that, Mr. Jarvis, did you [54] prepare any equipment for use in that demonstration?

A. Yes, sir. I had prepared a complete system of refrigeration, a condensing unit mounted on a stand, and also a coil, complete with all valves, and in order to demonstrate the water defrost system we used a little electric pump that picked up water from a sump, and over the coil and then returned back to the sump, and the water was used over and over again.

Q. Who introduced you at that meeting?

A. Mr. Barney Goldstein, the president of the San Francisco chapter.

Q. Any one else? A. No, sir.

Mr. Lewis Lyon: Will you mark this? .

The Clerk: B, for identification.

The Court: What is it?

The Clerk: A letter.

(The document referred to was marked as Defendant's Exhibit B, for identification.)

Q. By Mr. Lewis Lyon: I hand you a letter dated November 3, 1939, marked Exhibit B, for identification, and ask you if you can identify that, Mr. Jarvis.

A. I can. This was the notice sent out by the Association to all its members of the forthcoming demonstration of "Freezing While Defrosting." [55]

(Testimony of H. T. Jarvis)

Q. Does that letter refresh your recollection as to the date of that meeting, Mr. Jarvis?

A. November 8, 1939. That is right.

Mr. Lewis Lyon: I will offer in evidence the letter as identified by the witness, as Defendant's Exhibit B.

The Court: What is the purpose?

Mr. Neave: Yes.

The Court: It is only offered to refresh his recollection, and his recollection has been refreshed. The other side can introduce it, but as I remember the California Code section, why, you cannot. Do you object to it?

Mr. Neave: Yes, sir.

Mr. Lewis Lyon: I will withdraw the offer at the present time.

The Court: It will remain with the clerk, for identification.

Q. By Mr. Lewis Lyon: Did you appear at that meeting, Mr. Jarvis? A. I did.

Q. Approximately how many people were present?

A. I would estimate about 125 people.

Q. Did you make your demonstration before that Association meeting? A. I did.

Q. Will you state what transpired? [56]

A. After the preliminary order of business, Mr. Barney Goldstein introduced me, and I immediately started in to give a complete history of all defrosting methods that was known by the industry up to that time, and prior to giving a demonstration of the water defrost, and then I went into the demonstration of the unit that I had had built up; and immediately after defrosting the unit that had been first frosted up by the condensor unit on the stand, I further went into a complete story as to the possi-

(Testimony of H. T. Jarvis)

bilities of the water defrost, where they could be used, and how satisfactory they were. And at this stage of trying to explain as to how they could be used in cold storage installations, I was quite rudely interrupted by a Mr. Hawkins, who I understand, or understood at that time, was some assistant to Mr. Goldstein on the committee. I don't recall what his exact status was. Not being a public speaker, I assure you that it was somewhat of a shock to have any one, let alone Mr. Hawkins, right while I was speaking, jump up on his feet and turn his back to me, and make a statement to this group—

Mr. Neave: Just a minute. I want to object to anything that Mr. Hawkins said. This witness has been asked what he did. Now, it is not pertinent as to what Mr. Hawkins said here, and it is purely hearsay.

The Court: Doesn't that go to the state of the prior art? [57]

Mr. Lewis Lyon: Certainly.

Mr. Neave: No, not as to what somebody said.

The Court: But all prior art is what somebody said.

Mr. Neave: What somebody said, if it is in a written disclosure. If it was in a written disclosure, it can be offered, not for proof of itself, but as proof that it was there at the time the man made his invention. You see, what they are trying to do here is to try to prove invention by somebody being surprised. We don't know what the condition of that particular person was, why he was surprised, or what he knew. It is an entirely different matter when somebody is attacking a patent by documentary evidence or testimony, because there it is a matter of what was disclosed and what the inventor had before him. This is just hearsay.

(Testimony of H. T. Jarvis)

The Court: Would it not be admissible on the matter of its use, that is, that it is a new and useful invention?

Mr. Neave: I think it has absolutely no bearing on the question of its being new.

The Court: In other words, that it was an invention, and to show an invention was useful the testimony is put in to show what went on before, and what the attitude of the industry was, or somebody was.

Mr. Neave: What the facts are, your Honor, but not as to what somebody said, who is not here to be cross-examined; not as to what he said. [58]

Mr. Lewis Lyon: I think it is perfectly proper, your Honor, as definitely showing the state of the man's mind, and is an exception to the hearsay rule; in other words, on presentation of this proposition, he immediately objected that it could not be done.

The Court: Are you testifying?

Mr. Lewis Lyon: No, I am not testifying, but that is what the purpose of the showing is, your Honor. It shows definitely the state of the art, and, further, it shows the reception of this invention and the objections of qualified engineers that Mr. Jarvis encountered in trying to introduce it. It is one of the most persuasive points of the invention, of showing the state of the art and the manner in which the invention was received.

Mr. Neave: I have no objection to the state of the art being shown, but I object to how it is shown, and you can't show it by hearsay testimony of this character. It is not proper.

Mr. Lewis Lyon: It is a recognized exception to the hearsay rule, your Honor.

(Testimony of H. T. Jarvis)

Mr. Neave: What counsel is trying to do is to prove something by this statement that the witness is going to make of what somebody else said.

The Court: He is trying to prove what he said at that meeting. [59]

Mr. Neave: Of course, from the point of view of relevance, I don't think it is relevant at all. It has very small relevance. You see, we know nothing about this gentleman, who he is, or what he was, that made him think that it wasn't possible, if it did make him think it wasn't possible. There may be a great many reasons for his not thinking that it was possible, and it would have nothing to do with the invention.

Mr. Lewis Lyon: It is proper to show the man's state of mind by his utterances, and that is what this testimony shows.

The Court: But who is he?

Mr. Lewis Lyon: I will continue to show you that, your Honor. Right here, from Exhibit B, for identification, Mr. John A. Hawkins is identified as one of the Advisors to the Educational Committee of the National Association of Practical Refrigerating Engineers. I am going to follow that up, to show who he is, right here.

Mr. Neave: As I see it, your Honor, there is no point in issue as to what this man's state of mind was. That isn't the issue here.

(Testimony of H. T. Jarvis)

Mr. Lewis Lyon: That is directly the issue.

Mr. Neave: In addition to which, of course,—

The Court: I think probably it is just as admissible, and I don't know whether error piled on error produces good results, but I do know it is practice to admit reports of [60] proceedings of technical and engineering societies when they are discussing subjects in patent cases, and I think this is as admissible as that is.

Mr. Neave: It depends on what you are trying to prove, your Honor. As I stated, if I were to offer such a report, in which water defrosting was disclosed, then that would be admissible.

The Court: Or discussed, or if the state of the art was discussed.

Mr. Neave: Or discussed, because that shows that was in the art, and the inventor is taxed with it, and he must know that. Everything that is in the art the inventor must know.

The Court: I think it is admissible.

Mr. Neave: This is a back-handed way of doing it, your Honor, because this fellow—

The Court: Well, if you can produce it by a writing, you can produce it orally as a record of a proceeding. The objection is overruled.

We will recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same day.) [61]

Los Angeles, California; September 17, 1946; 2:00 o'clock P. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor. Further trial.

The Court: Before we proceed with the case, the senior judge has asked that we take some note of the fact that this is the 159th anniversary of the signing of the Constitution. I just want to mention that and let the Clerk make a minute appearing in the minutes that attention of counsel and the court was called to the fact that for 159 years the American courts have been sitting uninterruptedly under the Constitution.

Proceed.

Mr. Lewis Lyon: Before proceeding, in order to determine, as far as I am able to, just what our program of presentation of this evidence will be, we have certain installations which, if your Honor feels it would help you in any way to understand this case, we would like to have you see actual installations and operation. In fact, there are two of the installations which I have referred to in my opening statement, that is, the Johnson Pie job and the Dutch Maid Ice Cream, the operations of which are still proceeding as they were originally installed, and I think it would help your Honor to understand this case very materially to see the actual operation of these structures and how they are operated. [62]

We could arrange for that inspection at any time that would suit your Honor's convenience, or counsel for plaintiff.

The Court: Any objection?

Mr. Neave: No objection at all, your Honor, if it helps you at all in the case.

The Court: Well, while this is an American court we still give some adherence to the old Chinese proverb about one picture being worth 10,000 words, so we may be able to save somebody 10,000 words here.

When would be an appropriate time to go? Before the patent is explained or afterwards? I mean, before your experts get up and say, "Turn petcock 1 to valve 6."

Mr. Lewis Lyon: I think, your Honor, it would be just as well to see it before and maybe it will eliminate a lot of necessity of that detailed explanation.

The Court: From both counsel's opening statement, the patent doesn't appear to me to be a very intricate or involved one at all.

Mr. Lewis Lyon: No, it isn't.

The Court: In fact, I flatter myself with feeling that I have some sort of an understanding of it now.

Mr. Lewis Lyon: It is very simple as far as the mechanical operations are concerned. It is very interesting to see it in actual performance, as I think you will see.

The Court: You want me to go and see one of your in- [63] stallations?

Mr. Lewis Lyon: Yes.

The Court: Have you got a brine installation that I can see?

Mr. Lewis Lyon: I have tried to find a brine installation, but unless plaintiff is able to supply one, I can't at the present time.

Mr. Neave: I can find out, your Honor. I don't happen to know.

If these installations are inspected, I was wondering whether counsel intends to have testimony taken at the time of inspection. Is a record going to be made, and so forth? I think perhaps the device is so simple that it

might not be necessary for your Honor to see the installation, but if it is of any help to you, of course I have no objection.

The Court: Well, from both counsel's statements it would seem to me that in a comparison of what you assert is the disclosures of the prior art and more nearly in anticipation of this patent than any other would be the brine installation, and I think that if I could see one I would like to see the other.

Mr. Neave: I will find out and let your Honor know a little later.

The Court: Very well. We will proceed this afternoon then with the testimony and settle that later. [64]

Mr. Lewis Lyon: Your Honor, then the understanding is that you will settle the time later?

The Court: Yes, when he sees if he can find a brine installation.

H. T. JARVIS,

called as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Mr. Lewis Lyon: I believe there was a question remaining unanswered at the conclusion.

The Court: Yes. Will you read it, please?

(The record was read by the reporter as follows:

"Q. Will you state what transpired?

"A. After the preliminary order of business, Mr. Barney Goldstein introduced me, and I immediately started in to give a complete history of all defrosting methods that was known by the industry up to that time, and prior to giving a demonstration of the water defrost, and then I went into the demonstration of the unit that I had had

(Testimony of H. T. Jarvis)

built up; and immediately after defrosting the unit that had been first frosted up by the condenser unit on the stand, I further went into a complete story as to the possibilities of the water defrost, where they could be used, and how satisfactory they were. And at this stage of trying to explain as to how they could be used [65] in cold storage installations, I was quite rudely interrupted"—)

The Court: "Rudely interrupted" may be stricken. Strike everything from there down to what Mr. Hawkins said.

(Continuing reading):

"—by a Mr. Hawkins, who I understand, or understood at that time, was some assistant to Mr. Goldstein on the committee. I don't recall what his exact status was. Not being a public speaker, I assure you that it was somewhat of a shock to have any one, let alone Mr. Hawkins, right while I was speaking, jump up on his feet and turn his back to me, and make a statement to this group—")

The Court: That sentence may be stricken. The objection was to what his statement was. That objection is overruled. You may now state what Mr. Hawkins said.

The Witness: Mr. Hawkins stated that he refused to sit there any longer and let a newcomer into the industry tell him that this system would work.

Q. By Mr. Lewis Lyon: As a result of that demonstration that you made at San Francisco, were you able to

(Testimony of H. T. Jarvis)

obtain any orders for this water defrost system in the Bay area?

A. Not for a considerable time; about a year, as I recall the time.

Q. What was the installation that you finally made in [66] the San Francisco Bay area?

A. The Haslett Warehouse job at Oakland.

Q. Will you state the circumstances leading up to and the facts of that installation in the Haslett Warehouse, Mr. Jarvis?

A. This Haslett installation or Haslett job came to my attention quite by accident on a Sunday while visiting the Haslett Warehouse with a friend. I was on my trip to the north to solicit business from our distributors, and when I saw this job being calked in and saw the size of it, it was a room somewhere around 100 feet long by about 30 or 40 feet wide, I became tremendously interested and stayed over in San Francisco until Monday morning, at which time I contacted Mr. Hinman, the general manager of Haslett, and asked him from whom he was purchasing his refrigeration for the cold storage warehouse I had seen, and he stated to me that he was—

Mr. Neave: Your Honor, here we go again.

The Court: I think so.

Q. By Mr. Lewis Lyon: Just eliminate what was stated to you at that time, Mr. Jarvis, and continue with your explanation of this installation.

A. Mr. Hinman showed sufficient interest to call in his chief engineer, Mr. James Payne, and made the statement to me if I could sell Jimmie Payne—

Mr. Neave: Your Honor, this is more hearsay. [67]

(Testimony of H. T. Jarvis)

The Court: I think so. Omit the statements that they made to you.

Q. By Mr. Lewis Lyon: You stated that he called in Mr. Payne, and you then took the matter up with Mr. Payne; is that correct?

A. Yes, that is correct. And Mr. Payne—

Q. As a result of your conversation with Mr. Payne, you were able to get the order for that installation, were you?

A. On a six months trial basis, yes, sir.

Q. Was it or was it not necessary for you to give any guarantee to get that job installed?

A. It was necessary to give a guarantee that if the units did not work to their entire satisfaction and in accordance with the statements regarding how it would function, that we would take it out with no cost to them and replace the original installation that they intended to put in at no cost to them.

Q. Was that job installed on that understanding?

A. Yes, sir, it was.

Q. Is that job still operating?

A. Yes, sir, it is.

The Court: What kind of a system did you agree to put back in, if you took your out?

The Witness: The system that Haslett had already engineered and had purchased the pipe to install. [68]

The Court: What was it?

The Witness: A pipe installation, your Honor.

The Court: A brine system?

The Witness: No, sir, an ammonia system with a direct expansion, where the entire ceiling of this room for about four feet down was filled with coils.

(Testimony of H. T. Jarvis)

The Court: What defrosting system did he have?

The Witness: Your Honor, on that type of defrosting it was necessary to use the hot gas method, in which case they would be obliged to remove from the room hundreds of thousands of pounds of frozen products.

The Court: All right. Did you put the system in?

The Witness: Yes, your Honor, we did.

The Court: Do you know whether or not it has worked? Have you been back there?

The Witness: I have been back a number of times.

The Court: Did you have to take it out and put the other in?

The Witness: No, sir, we did not.

The Court: Does that system still remain there?

The Witness: It still remains.

The Court: When did you put it in? When was it completed?

The Witness: The exact date, your Honor, I don't recall.

The Court: Well, about when? [69]

The Witness: About early 1939.

The Court: Early in 1939. Is it there and has it been operating during this period?

The Witness: Continuously.

The Court: Continuously?

The Witness: Yes, sir.

The Court: The same system?

The Witness: The same system.

The Court: No changes?

The Witness: No changes after the initial adjustments were made.

The Court: Very well.

(Testimony of H. T. Jarvis)

Q. By Mr. Lewis Lyon: That system was written up, I believe, after installation, sometime later, in the "Air Conditioning and Refrigeration News", was it, Mr. Jarvis?

A. That is correct.

The Court: That will be C, for identification.

(The document referred to was marked as Defendant's Exhibit C, for identification.)

Mr. Neave: Are you offering that?

Mr. Lewis Lyon: I will have to have it identified first.

Q. By Mr. Lewis Lyon: I hand you Exhibit C, which is entitled "Reprint from Air Conditioning Refrigeration News" of September 17, 1941, and ask you if you can identify this, Mr. Jarvis. [70]

A. Yes, I can.

Q. You identify this as what?

A. As the story that was written up about the Haslett installation.

Q. And was that published in the periodical which appears at the top of Exhibit C?

A. Yes, it was.

Q. Under what date?

A. Under the date of September 17, 1941.

Q. That is a periodical of the refrigeration industry, is it?

A. Yes, sir.

Q. Of general circulation?

A. Yes, it has a very wide circulation.

Mr. Lewis Lyon: I will offer this article in evidence as Defendant's Exhibit C.

Mr. Neave: I object to it, your Honor. I don't see the relevance of this article, and I submit it is completely

(Testimony of H. T. Jarvis)

hearsay. After all, this is with respect to an installation long after the invention of the patent.

The Court: It would be admissible, if admissible at all, on the element of its being a useful invention and having commercial success.

Mr. Neave: Having commercial success, yes, but there may be all sorts of statements in that article of fact, which, of [71] course, have no prohibitive value here. Just because some statement is made in this article is not a proper way of proving the facts with respect to that statement, and the question of commercial success ought to be proved by somebody who can be cross-examined upon it.

The Court: I think so. Of course, you can cross-examine this witness, so far as he goes, as to the weight of his testimony. [72]

Mr. Lewis Lyon: We will produce also Mr. James Payne, the engineer that operated that plant here.

The Court: The objection is sustained. This in the meantime will be marked for identification. If you produce the author of the article, then he can be cross examined.

Mr. Lewis Lyon: I will re-offer it through the other witness.

If I might explain, our purpose is to show the public recognition that was given this job on the element of commercial success, and also the proposition of the commercial recognition that was given this system after the Refrigeration Engineering overcame the initial resistance to its introduction. I am not presenting that as an argument at the present time, but merely as an explanation, your Honor.

(Testimony of H. T. Jarvis)

The Clerk: Defendant's C for identification.

(The document referred to was marked Defendant's Exhibit C for identification.)

By Mr. Lewis Lyon:

Q. Mr. Jarvis, in referring to this association meeting at which you presented your story with respect to water defrosting, you refer to a Mr. Hawkins. I hand you Exhibit B for identification and will ask you if the Mr. Hawkins you refer to is identified on this exhibit.

A. Mr. John A. Hawkins is on this under the Advisors Educational Committee. He is the same Hawkins that I referred to. [73]

Q. What was your first installation made in the city of Los Angeles or in this immediate vicinity?

A. It was made to an Oriental fellow on San Pedro Street. I think he pronounced his name Kawike.

Q. K-a-w-i-k-e? A. That is correct.

Q. Will you explain the circumstances of that installation, Mr. Jarvis.

A. Well, I was able through a very personal friend of mine, Mr. Elmer Johnson—

The Court: What is the materiality of the circumstances, counsel?

Mr. Lewis Lyon: The materiality, your Honor, is that I want to show the difficulty that they had in introducing this system, what happened when this installation was made and what steps were necessary in order to get this system introduced at all because of the trade resistance and the resistance of the so-called engineers in the art that were supposed to know.

The Court: All right. Go ahead.

(Testimony of H. T. Jarvis)

The Witness: I was able to get this job installed through the personal help of a very good friend of mine, Mr. Elmer Johnson, who was chief engineer for O'Keefe & Merritt Company, who made the installation, who also manufactured the condensing unit.

It was installed in a reach-in hardening cabinet to hard- [74] en the ice cream from one of O'Keefe & Merritt's freezers that they manufacture

We encountered considerable trouble on this job because we failed to supply sufficient coverage with our spray except on the fin section of the coil and did not supply the water spray over the return bends assuming, I guess, because they were out of the airstream they would not frost, and consequently we had to take that coil out and build another coil with sprays over the return bends before the job was entirely satisfactory.

By Mr. Lewis Lyon:

Q. After this change was made, was the job entirely satisfactory? A. Yes, it was.

Q. And it stayed put? A. Yes, sir.

The Court: Is it still there?

The Witness: Your Honor, I don't know whether it is or not. I haven't personally investigated it.

By Mr. Lewis Lyon:

Q. In introducing this system in the city of Los Angeles, did you at any time appear before any meeting of any engineers here in Los Angeles of any company or otherwise, Mr. Jarvis?

A. I gave one public demonstration at the R. W. Weid- [75] line Company on South Los Angeles Street.

(Testimony of H. T. Jarvis)

Q. Who was present at that demonstration?

A. There was about 30 refrigeration salesmen and engineers, sales engineers, present, and in addition to the engineers working for the R. W. Weidline Company there was a Mr. Vering of the Vering Manufacturing, Mr. Carl Hyde, also of the Vering Manufacturing, and a Mr. Wally Hulse from Koch Refrigerator, whose product Mr. Weidline also handled.

Q. What was the reception of that demonstration at that time?

A. The reception at that time was typical of all other receptions, that everyone would look at it and make very few comments, because most people don't just make comments without some reason for it, or ask for their comments, but those that did comment said that they would have to see a job installed before they would believe it would work.

Mr. Neave: Your Honor, I don't like to interrupt, but it seems to me that the continual reference to what people said is not proper under the circumstances.

The Court: I suppose the only admissibility of this at all would be that it would tend to show the novelty, that this was a new thing.

Mr. Neave: I don't think that is the proper way of proving that. It has no probative value. We haven't any indication of the competence of these people that he is talking to. [76]

In addition to that, this is long after the invention of the patent.

The Court: Of course it would apparently be still new.

(Testimony of H. T. Jarvis)

Mr. Lewis Lyon: It shows the reception that the art had of it and that it was very contrary to the teachings of the art and that the people said that they could not accept it unless they saw it work, which goes very heavily to the point—

The Court: I think that is true, but I don't know. I overruled the other one on that basis. I think he is right. I think if you want to produce that kind of testimony you will have to produce the people who said it.

The objection will be sustained, and that portion of the answer stricken as to what they said.

Did you sell any orders there?

The Witness: Yes, sir.

The Court: How many?

The Witness: Do you mean, your Honor, that I sold an order that night from the demonstration?

The Court: Did that result in orders?

The Witness: It resulted in some future orders from the R. W. Weidline Company. That is what I meant to say.

By Mr. Lewis Lyon:

Q. Did you do anything in addition to this demonstration in furthering the obtaining of the orders from the R. W. [77] Weidline Company, Mr. Jarvis?

A. The only thing I did other than the demonstration was to talk to various customers at the R. W. Weidline Company who were brought to our plant to see this device, this water defrost coil.

The Court: Did you have one in operation at your plant?

The Witness: Yes, sir; we did.

(Testimony of H. T. Jarvis)

By Mr. Lewis Lyon:

Q. And customers were brought there to look at it, were they? A. They were.

Q. Before any of these sales were made?

A. They were.

Q. You stated, Mr. Jarvis, that there was one Mr. Hulse present at this meeting, is that correct?

A. That is right.

Q. Are you acquainted with Mr. Hulse?

A. Yes, I am.

Q. Were you acquainted with him before the meeting?

A. I had met him on one occasion prior to that demonstration.

Mr. Lewis Lyon: Your Honor, I don't want to appear to be going against your Honor's ruling in this, but maybe it is not an opportune time, it is more in the nature of rebuttal, but I do want to set before this court, either now or in [78] rebuttal, the position that was taken by Mr. Wally Hulse at the time of that demonstration as he is one of the principal witnesses relied upon by the plaintiff in their attempt to prove prior use.

The Court: Maybe you can get it out of him by cross examination, so why take up the time now?

Mr. Lewis Lyon: Mr. Hulse is not here, and won't be here.

The Court: I thought you said he is one of their principal witnesses.

Mr. Lewis Lyon: They took his deposition in Portland.

The Court: In Portland?

Mr. Lewis Lyon: Yes, in this matter.

The Court: I think it is anticipatory, counsel.

(Testimony of H. T. Jarvis)

Mr. Lewis Lyon: I will wait until the matter is put in and then renew the offer, if that is your Honor's desire.

Q. Did you ever have at this time dealings with Creamery Package Company or anyone connected with that concern? A. I did.

Mr. Neave: May we ask what "this time" is?

By Mr. Lewis Lyon:

Q. When was this?

A. I don't believe I understand your question.

Q. What was the time?

The Court: When did you have your meeting at Weidline?

The Witness: Your Honor, I don't remember the exact [79] date.

The Court: Well, approximately, the year.

The Witness: It seems like '39, but I am not sure. I can refer to the records. I have all those records. I have them here. I turned them over to Mr. Lyon.

By Mr. Lewis Lyon:

Q. You refer, do you, to the sales records that you gave me, Mr. Jarvis?

A. Yes, sir. I gave you a tabulated list of each individual coil that was sold of this new water defrost coil and to whom it was sold and the date.

The Court: Do you have it there?

Mr. Lewis Lyon: Yes, I have it here.

The Court: Why don't you lead him a minute. I think it would be harmless leading.

(Testimony of H. T. Jarvis)

By Mr. Lewis Lyon:

Q. I believe that you were referring to the time preceding the installation of this Johnston Pie Company job to establish that date, are you not, Mr. Jarvis?

A. Preceding the Johnston Pie job?

Q. Yes. A. I don't believe so.

The Court: When was the Weidline meeting?

Mr. Lewis Lyon: The Weidline meeting is not on here. He will have to pick it out as to how he establishes that [80] date, your Honor. I will hand him these records.

The Court: All right.

The Witness: I believe, your Honor, that the meeting at Weidline was within the first three months of 1939.

The Court: 1939?

The Witness: Yes, sir.

The Court: All right.

By Mr. Lewis Lyon:

Q. When did you first take this matter up with any representative of Creamery Package Company, Mr. Jarvis?

A. At about the same time of the meeting with Weidline Company, I called on both the Creamery Package and all other commercial refrigeration accounts in the city of Los Angeles.

Q. And as a result of your call upon Creamery Package, did you make any arrangements with that concern?

A. I made no specific arrangements at the time I called on them.

Q. At a later date, did you?

A. I made specific arrangements with them at the time they brought a Mr. Lawrence from the Dutch Maid

(Testimony of H. T. Jarvis)

Ice Cream Company, one of their customers, and agreed to guarantee the installation if they would put it in and take the coils out if they did not function.

Q. That is with reference to the Dutch Maid job, and when was that installed or that order taken, if you will re- [81] fer to your records?

A. In December of 1939.

Q. Now will you explain the situation with respect to the installation of the Johnston Pie Company job in Los Angeles.

A. May I have that question?

(The question referred to was read by the reporter, as follows:

("Q. Now will you explain the situation with respect to the installation of the Johnston Pie Company job in Los Angeles.")

The Witness: This job was handled mainly by one of my sales engineers, Mr. Kirkwood, who was the Frigidaire Engineer, just prior to our hiring him about three months before the Johnston Pie job, and through one of the Frigidaire dealers that he knew very well he was able to get them to recommend to Mr. Johnston of the Johnston Pie Company the water defrost installation, and subsequently I gave them, or Mr. Kirkwood rather gave them, a letter with my approval guaranteeing the installation if they would put it in.

By Mr. Lewis Lyon:

Q. That is, you gave them a written guarantee before they would permit that installation to be made?

A. I authorized a guarantee, or Mr. Kirkwood's signature, to be given; yes, sir.

(Testimony of H. T. Jarvis)

Q. Do you know, Mr. Jarvis, of your own knowledge [82] whether that Johnson Pie Company is still installed?

A. Yes, I do.

Q. Is it still working?

A. Still working to their satisfaction.

Q. Do you know, Mr. Jarvis of your own knowledge as to whether the Dutch Maid Ice Cream job is still installed?

A. I do.

Q. Is it still operating? A. Yes, it is.

Q. Giving satisfaction? A. It is.

Q. You have never been called upon to replace or change either of these jobs in any way?

A. No, sir, we have not.

Q. I hand you a copy of a letter of June 16, 1939, addressed to Johnston Pie Company, and I will ask if you can identify this letter.

The Court: D.

The Clerk: D for identification.

(The document referred to was marked Defendant's Exhibit D for identification.)

The Witness: This is a copy of the letter that Mr. Kirkwood was authorized to send to Mr. Johnston.

By Mr. Lewis Lyon:

Q. The original of that letter was signed in your [83] presence? A. It was.

Q. Is this a true ribbon copy of that letter?

A. Yes.

Q. Was the letter, to your knowledge, sent to or posted to the Johnston Pie Company, the addressee?

A. Yes, sir.

(Testimony of H. T. Jarvis)

Mr. Lewis Lyon: I will offer this copy in evidence as Defendant's Exhibit D.

Mr. Neave: No objection.

The Court: Admitted.

(The document referred to was received in evidence and marked Defendant's Exhibit D.)

[Note: Defendant's Exhibit D will be found in the Book of Exhibits at page 1484.]

Mr. Neave: I don't know what the custom is here, your Honor, but we have no copies of these exhibits and I hope that counsel will furnish us promptly with copies of them.

Mr. Lewis Lyon: Yes, I will see that you get copies.

The Court: I somehow or other had the impression that each side here had exchanged prior to the trial copies of all writings they had expected to rely upon.

Mr. Neave: No, sir.

Mr. Lewis Lyon: We haven't either.

The Court: How did we miss on that?

The Clerk: We didn't have a pretrial.

Mr. Neave: For purposes of cross examination, it would [84] be helpful to have these exhibits. I don't know whether it is possible for us to take these out of the Clerk's custody over night, or what.

Mr. Charles Lyon: If it is agreeable, we will withdraw the exhibits and photostat them at the end of each day and supply you with photostats the following morning.

The Court: Is that agreeable?

(Testimony of H. T. Jarvis)

Mr. Neave: That is a little difficult, your Honor, because then they are not available to us during the evening. I hope that Mr. Lyon hereafter can make available when he is offering something a copy for our use.

The Court: Maybe you can get photostats beforehand.

Mr. Lewis Lyon: As far as possible I will, your Honor. Some of this correspondence has only recently been presented to me.

The Court: Very well.

Mr. Neave: I might add, your Honor, I understand that Mr. Lyon wants to offer a number of publications, and so forth, and yesterday I asked him for copies of those, which I haven't received yet. I hope that I can get them at the time they are offered.

Mr. Lewis Lyon: I will get them to you before this evening. I have one additional one that I will try not to refer to tonight, but I will have it for you in the morning if possible. [85]

Mr. Neave: Thank you.

The Court: I am sorry I didn't have a pretrial conference in this matter because ordinarily in patent matters I like to see that all prior art and previous publications are exchanged between the parties sufficient in advance or trial.

Do you have additional copies?

Mr. Neave: Yes, indeed, your Honor. Ours, of course, have already been noticed in the complaint and they can get those, and those that were not I gave to Mr. Lyon yesterday.

The Court: Very well. You will have those ready tonight?

(Testimony of H. T. Jarvis)

Mr. Lewis Lyon: I will try to get them, your Honor.

Mr. Charles Lyon: As fast as we can get the photostat operators to work. We have some of them already.

The Court: Very well.

By Mr. Lewis Lyon:

Q. Mr. Jarvis, have Refrigeration Engineering licensed any other concern under the McAdam patent in suit?

A. A number of them. [86]

Q. Can you name the companies that are licensed?

A. I believe I can.

The Court: You have the agreements there. Hand them to him so he can refresh his recollection, and I believe it will save some time.

Counsel, have you seen them?

Mr. Neave: No, sir.

The Court: Are they all the same?

Mr. Lewis Lyon: Not identical, your Honor.

The Court: All right.

Mr. Lewis Lyon: They are principally the same. As far as I know, your Honor, they are word for word, with one possible exception, so it may be just as well to use one as a sample, and I will leave the others here.

The Court: We will have them all marked for identification, and then use one to be introduced in evidence, if it is admissible. We can determine that later. There is no use in building a record up here.

Mr. Lewis Lyon: That is right.

The Clerk: These will be Defendant's Exhibits E, F, G, H, I, J, K, and L.

The Court: E to L?

The Clerk: E to L.

(Testimony of H. T. Jarvis)

(The documents referred to were marked as Defendant's Exhibits E, F, G, H, I, J, K, and L, for identification.) [87]

Mr. Neave: And may they be identified as to which is which, Mr. Lyon?

Mr. Lewis Lyon: I will give them to you. E is Drayer & Hanson. I will let you keep the Drayer & Hanson, or, I will use that one and you can take the others. First I will have them identified.

Q. By Mr. Lewis Lyon: Can you determine from these copies of the license agreements who the licensees are, Mr. Jarvis? A. Yes, sir.

Q. Will you do so?

A. Drayer & Hanson Corporation, Los Angeles; Refrigeration Appliances, Inc., Chicago, Illinois.

Mr. Neave: Which exhibit is that?

Mr. Lewis Lyon: The first one was E. The second one is L, that he referred to.

The Witness: Pardon me. K is—

The Court: Can't you arrange them alphabetically? We will get them out soon enough.

Q. By Mr. Lewis Lyon: All right. Start with them upside down. You said E was Drayer & Hanson?

A. E is Drayer & Hanson, Incorporated, Los Angeles. F is the Bush Manufacturing Company, Hartford, Connecticut. G is General Machinery Company, Spokane, Washington. H is McQuay, Inc., Minneapolis, Minnesota. I is Manufacturers [88] Fin Coil, Chicago, Illinois. J is Globe Ice Machine Company, Los Angeles. K is Kramer-Trenton Company, Trenton, New Jersey. And L is Refrigeration Appliances, Inc., Chicago, Illinois.

(Testimony of H. T. Jarvis)

Q. By Mr. Lewis Lyon: I hand you, Mr. Jarvis, Exhibit H, for identification, and will ask you if this is a true photostatic copy of the existing agreement with the McQuay Manufacturing Company, and is it complete in every respect?

A. Yes, sir, it is a true photostatic copy of the original license agreement.

Q. Is that agreement now in effect?

A. Yes, sir, it is.

Q. Are the royalties still being paid under that agreement?

A. Yes, sir.

Q. In accordance with the terms of the agreement?

A. Yes, sir.

Mr. Lewis Lyon: According to the court's suggestion, I will offer the document, Exhibit H for identification, into evidence as Defendant's Exhibit H, it being represented that all of the other agreements are the same in terms. If I find any difference, I will bring it to the court's attention.

The Court: Admitted.

(The document referred to, heretofore marked Defendant's Exhibit H for identification, was received in evidence.) [89]

[Note: Defendant's Exhibit H will be found in the Book of Exhibits at page 1485.]

Q. By Mr. Lewis Lyon: Have you had a compilation made of the royalties that have been paid you or to Refrigeration Engineering under the terms of these agreements?

A. I have.

(Testimony of H. T. Jarvis)

Q. Does that compilation give a true account of those records? A. It does.

Q. I hand you some papers, Mr. Jarvis, and ask you if that is the compilation of your royalty accounts with these different parties?

A. Yes, sir, they are.

Q. From those reports can you state the total royalties that have been paid to you by each of the licensees, up to and including the last date shown by that compilation?

A. The Kramer-Trenton Company, \$3,591.90, up to the end of 1945. Refrigeration Appliances, \$12,918.85, to the end of 1945. Manufacturers Fin Coil, \$170.42, to the end of 1945. Drayer & Hanson, \$16,710.40, to the end of 1945. McQuay, Inc., \$11,550.78, to the end of 1945. Bush Manufacturing, \$7,363.20 to the end of 1945. General Machinery Company, \$40.20, to the end of 1945. Globe Ice Machine Company, none; it is a new license agreement.

Mr. Lewis Lyon: That is all. You may cross-examine.

The Court: Cross-examine. [90]

Cross Examination

By Mr. Neave:

Q. Mr. Jarvis, as I understand it, you are familiar with refrigeration problems? A. I feel that I am.

Q. What education have you had in technical engineering lines?

A. Mainly the School of Hard Knocks.

Q. Are you an engineer, graduate engineer?

A. I am not.

(Testimony of H. T. Jarvis)

Q. You started work in refrigeration in 1927?

A. That is correct.

Q. What did you do at that time?

A. Sold household refrigeration for the first perhaps year or year and a half.

Q. Whom did you work for then? A. Myself.

Q. Were you an agent for somebody else?

A. I operated under the name, fictitious firm name, of Jarvis Brothers.

Q. You sold somebody else's refrigeration equipment; is that right? A. That's right.

Q. Whose equipment?

A. I sold Kelvinator and O'Keefe & Merritt primarily. [91]

Q. Was that household refrigeration?

A. No, sir. The household was O'Keefe & Merritt.

Q. I can't quite hear you, Mr. Jarvis.

A. The household was O'Keefe & Merritt.

Q. And that was for a year that you did that work?

A. From a year to eighteen months.

Q. What did you do after that?

A. I continued to sell household refrigeration, and in addition commercial refrigeration.

Q. That was for yourself? A. That's right.

Q. Selling other people's equipment?

A. That's right.

Q. Did you do that until 1932? A. I did.

Q. And then you formed your company?

A. Formed the present corporation, Refrigerating Engineering, yes, sir.

Q. And you have been with them ever since?

A. That's right.

(Testimony of H. T. Jarvis)

Q. That is a corporation? A. That's right.

Q. Now, I want to get a little clear in my own mind just what it is that your company manufactures, and what it is that it sells. I understood from your direct examination that they [92] manufactured the evaporator unit, the coils. Now, does that include the fan? Do you manufacture the fan?

A. No, sir, we do not manufacture the fan.

Q. And you do not manufacture the motor that goes with that? A. No, sir, we do not.

Q. That is a part, however, of the unit that you sell?

A. It is.

Q. You buy those and resell them. What about the container which in the patent is shown above the coils? Do you sell such a container?

A. I don't believe I understood your question.

Q. There is the water defrost spray container placed above the coils. Do you sell such a container with your unit? A. We do.

Q. And you make that? A. We do.

Q. What about the drip pan below the unit? Do you make and sell that? A. Yes, we do.

Q. Now, what about the connections to the container, water container, above the coils, the rubber hose, I believe it is? Do you sell the rubber hose?

A. We do not.

Q. When you sell these units, you sell them as a unit, [93] a complete unit, consisting of the water container, the evaporators, the fans, the motor and drip pan only; is that right? A. That's right.

(Testimony of H. T. Jarvis)

Q. Now, do you sell any valves, three-way valves, with the unit?

A. We supply a three-way valve with each unit, yes, sir.

Q. That is with each unit that you sell?

A. Each water defrost unit.

Q. Now, do you sell the water defrost unit separately from the entire unit, the coils?

A. I am sorry. Your question isn't clear.

Q. Well, my difficulty is that I am not quite clear as to what it is you sell. Is this a package you sell, a complete package, consisting of a tank on top the coils, the fan, the motor, and the drip pan, all enclosed in one package?

A. Yes, sir, that's right.

Q. I see. So that with each such package you sell the valve,—a valve; is that right?

A. That's right.

Q. But no conduits, no water conduit between the valve and the other parts of the unit?

A. Yes, I would say that we sell some conduit with it, because there is a piece of conduit connected on to the spray pan and also the defrost pan. [94]

Q. How long a piece is that?

A. Maybe 8, 10 or 12 inches, depending on the model.

Q. That is integral with the pan?

A. It is.

Q. I see. But there is, as I understand it, conduit between the unit and the valve, and you don't sell that?

A. No, sir.

Q. That is right. Now, these valves that you sell, you don't make those?

A. We do not.

Q. What are they? What kind of valves are they?

A. They are a three-way valve.

(Testimony of H. T. Jarvis)

Q. Just what does that mean?

A. It means that you can use either one of three openings on them.

Q. Is that a manually-operated valve?

A. The one that is supplied with each unit, yes.

Q. It is not electrically-operated? A. No, sir.

Q. And that you buy in the open market?

A. Yes, sir.

Q. Was that available as a commodity when you went in business in 1927?

A. I don't know whether it was or wasn't.

Q. Was it in 1932, when you incorporated your company? [95]

A. I wouldn't know whether it was or not. I had no occasion to find out.

Q. You never saw a three-way valve prior to the time that you started selling them in this unit?

A. To my knowledge I had not, no, sir.

Q. After you sell these units, do you install them?

A. We do not, no, sir.

Q. Do you sell them to retailers who then do the installation?

A. We sell them to contractors and other manufacturers only.

Q. And they make the installation?

A. Yes, sir.

Q. They make the connections?

A. That's right.

Q. Now, you mentioned the National Association of Practical Refrigerating Engineers. Do you know what

(Testimony of H. T. Jarvis)

are the qualifications necessary to become a member of that association?

A. I don't believe I know exactly the qualifications except that they must be an engineer in the industry. I believe that is the basic qualification, at least.

Q. Are you a member? A. I am not.

Q. Do you know whether or not you have to be a graduate [96] engineer to be a member of that Association? A. I am sorry, I don't know.

Q. Now, you mentioned a Mr. John A. Hawkins who interrupted you while you were talking. What is his full name, do you know?

A. I believe it is John A. Hawkins.

Q. Where is he from? A. San Francisco.

Q. Do you know him personally?

A. I do now, yes, sir.

Q. You didn't know him before then?

A. I did not, no, sir.

The Court: Have you sold him your refrigeration?

The Witness: No, sir, I haven't.

Q. By Mr. Neave: What is his business, do you know?

A. He is an engineer. I believe at the present moment he is with the government, but he has been, since I met him at this meeting, an engineer for one of the large ice companies in San Francisco.

Q. When you used the term "engineer," how were you using it? Do you mean a graduate engineer?

A. I mean that he is the man that has complete charge of the refrigeration machinery, and is called an engineer, and all problems pertaining to the equipment are referred to him as an engineer. [97]

(Testimony of H. T. Jarvis)

Q. You don't know whether or not he is a graduate engineer?

A. I don't know whether he ever went to school a day in his life or not.

Q. That's right. You didn't know anything about him prior to the time he interrupted you?

A. No, sir.

Q. Now, you mentioned a job that you put in, I think it was at the Haslett Warehouse, where you said that they had hot air defrosting. Was that the Haslett Warehouse job?

A. I don't believe it was.

Q. What job was that?

A. I don't know, sir, what job you are referring to.

Q. You recall in your direct testimony that the court asked you—

Mr. Lewis Lyon: It was hot gas.

Q. By Mr. Neave: Hot gas. The court asked you whether your method of defrosting was satisfactory, and you said, "Yes." Then he asked you what kind of defrosting you were going to put back in there if it wasn't satisfactory.

A. That was hot gas and not hot air.

Q. What job was that?

A. The Haslett Warehouse.

Q. The Haslett Warehouse. Now, that job, as then installed, before you put in your unit, had pipes, refrigeration [98] pipes, around the room; is that correct?

A. No, sir, the job had not been installed. They had purchased the pipe, but had not installed it at the time the sale was made.

Q. The installation that you would have had to have made if your device had failed would have been a pipe job; is that correct?

A. That's right.

(Testimony of H. T. Jarvis)

Q. That means that bare pipe would run around the room?

A. No, sir, that wouldn't run around the room. That would be mounted on the ceiling.

Q. On a portion of the ceiling?

A. On the entire ceiling.

Q. On the entire ceiling?

A. In that type of installation.

Q. Am I correct that there are, in general, two kinds of refrigerating units, and one is the, let us call it, package job, such as yours, where it is enclosed except for the front or side, or wherever it may be that the air is blown through, and the other kind where you have a lot of exposed pipes in a room and there is no fan, or possibly there may be a fan; is that right?

A. Well, that is two types of coils, yes, sir.

Q. There was those two types of coils?

A. Yes, sir. [99]

Q. You mentioned the first installation that you made at the Kawike store. What was the date of that installation?

A. I will have to refer to our installation here. 5-5-39.

Q. You mentioned the Kramer-Trenton Company as being one of your licensees. Do you know whether or not they sell refrigeration units with defrosting equipment other than water defrosting?

A. Yes, sir, they do.

Q. What kind?

A. I believe they sell two different kinds. One of them is an electric defrosting unit, and another is what they call a thermal bank unit they have recently developed.

(Testimony of H. T. Jarvis)

Q. What does that mean?

A. Don't ask me what it means, because I don't think I can tell you exactly what it means, except they store up hot liquid and use it for defrosting, much the same as they do hot brine.

Q. I see. What about the Refrigeration Appliance Company? That is also a licensee of yours?

A. That's right.

Q. What equipment do they sell other than the water defrosting equipment?

A. I don't know whether they sell any other type of defrosting equipment or not. [100]

Q. What about the Manufacturers Fin Coil Company? Do they sell other types of defrosting equipment?

A. Not to my knowledge.

Q. I noticed that their royalties are \$170.42. Do they sell equipment for low temperature use?

A. Yes, they do. [101]

By Mr. Neave:

Q. What about Drayer & Hanson, what kind of defrosting do they use? A. Water defrost.

Q. Any other kind? A. Not to my knowledge.

Q. What about McQuay, Inc.?

A. Same applies with McQuay.

Q. You don't think they sell anything but water defrost? A. If they do it isn't known to me.

Q. And the Bush Manufacturing Company?

A. Nothing but water defrosting.

Q. And the General Machinery Company?

A. I believe the same applies there, water defrosting.

Q. Only water defrosting? A. Yes.

(Testimony of H. T. Jarvis)

Q. Doesn't the General Machinery Company sell refrigeration units for low temperature, below freezing jobs? A. Yes, they do.

Q. How long was it after you first started your company in 1932 that you first started making these water defrost units? A. About five years.

Q. Have you seen a brine defrosting unit in operation? [102] A. Yes, I have.

Q. Have you seen the coils when they were being defrosted? A. Yes, sir.

Q. Have you seen the coils of a hot gas unit while it is being defrosted? A. I have.

Q. What about a hot air unit?

A. I don't believe I could say that I have seen one while they are being defrosted because they are in a duct system or they couldn't be defrosted with hot air.

Q. When you say they are in a duct system, does that mean that this package unit is closed off from the rest of the room when the defrosting is taking place?

A. That is what I meant to imply; yes, sir.

Q. And the hot air circulates just within the unit and goes out again and doesn't go into the refrigerated space?

A. That is right.

Q. Now when brine is used to defrost, what effect, if any, does the brine have upon the frost or ice on the pipes? A. Well, it melts it.

Q. Does it have any solvent effect in addition or different from that which water has?

A. You said solvent? [103]

Q. Yes.

A. I don't know whether you would call it solvent or not, but it does deposit small particles of salt on the pipe.

(Testimony of H. T. Jarvis)

Q. Does the salt help in melting the ice or frost?

A. I don't believe so.

Q. When water defrosting is used, isn't it a fact that the frost or ice on the coils at the top of the unit melt off first?

A. Quite obviously.

Q. And then progressively downward?

A. That is right.

Q. And of course you don't turn the water off until all of the frost or ice has been taken off of the coils? That is the purpose of the defrosting?

A. That is right.

Q. Now what is the temperature of this water that is used to defrost?

A. It depends on the locality of the installation.

Q. Do you use tap water?

A. That is right.

Q. What is the temperature of the tap water around Los Angeles, for instance?

A. Somewheres between 70 and 80 degrees.

Q. Now when you defrost with hot gas, as you have seen it done, isn't it so that the frosting or ice on the coils is [104] melted much the same and at the same rate at the top as it is at the bottom or in the middle?

A. That is not so.

Q. How does it go? Tell us about it.

A. The ones I have seen, the ice drops off from the lower coils first usually, because that is where the refrigerant is fed to the coils and it doesn't just melt off, it usually drops off.

Q. Drops off from the bottom first and works its way up?

A. That is right.

(Testimony of H. T. Jarvis)

Q. And you haven't observed the hot air because it has been enclosed while it was being defrosted, is that correct? A. That is correct.

Q. Now in defrosting with water, your water you say is between 70 and 80 in Los Angeles, what is the temperature of the top coils at the time that you finish your defrosting?

A. That depends on a great many conditions.

Q. What conditions?

A. The temperature of the refrigerant when you start to defrost, for one thing; temperature of the room for another.

Q. Now when you defrost, do you shut off the fan in your unit? A. We do.

Q. Do you shut off the refrigerant?

A. We do—I beg your pardon—did you say refriger-
[105] ant or refrigeration?

Q. Refrigerant.

A. I am sorry. I understood you to say refrigeration. We shut off the refrigeration machine and not the refrigerant.

Q. You shut down the compressor?

A. That is right.

Q. But you don't take the refrigerant out of the coils?

A. No, sir, we do not, nor do we shut off the supply of refrigerant to the coils at any time.

The Court: Doesn't that shut off when you shut off the compression?

The Witness: No, sir, not necessarily. The refrigerant continues. It depends on the pressure. It continues to go through the system to some extent.

(Testimony of H. T. Jarvis)

By Mr. Neave:

Q. Do you sell any evaporator units without a water defrost header? A. Yes, sir, we do.

Q. Have you ever brought suit under the McAdam patent against any of your customers, any of the people that have bought a water defrost system from you?

A. I believe that could be better answered by our attorneys, couldn't it?

Q. Well, you should know as vice president of the company, I should think. [106]

The Court: You mean brought suit on the patent?

Mr. Neave: On this patent against anybody who has purchased a water defrost system from them.

The Court: You mean from them?

Mr. Neave: From them, from the company.

The Witness: Yes, we did.

By Mr. Neave:

Q. Who was that?

A. The Acme Scale and Fixture and their supplier of coils, the Peerless of America; and later we filed another suit against Arden Farms and Gay Engineering and Carrier Corporation.

Q. That was because of their having purchased from you these units that you sold? A. No, sir.

Q. It was for having purchased the units from somebody else? A. That is right.

Q. To the best of your knowledge, you have never sued anybody because they purchased the unit that came from your company? A. Of course not.

Q. Does the McAdam patent number appear on the units that you sell? A. Yes. [107]

(Testimony of H. T. Jarvis)

Q. I think you stated that you don't sell any compressors or condensers, did you so state?

A. I stated that we don't sell condensing units, but we do sell a line of evaporative condensers.

Q. What about compressors?

A. We don't have anything to do with compressors.

Q. You don't sell the refrigerant used in these units, do you?

A. No, sir, we do not.

Q. Any refrigerant can be used in these units, is that correct?

A. If the unit is made for the particular type of refrigerant; yes, sir.

Q. Is that specified when you sell equipment? Is that one of the specifications?

A. Yes, sir.

Q. What is the purpose of the fins on these coils?

A. To act as inexpensive heat transfer medium.

Q. Does rubber have a relatively low specific heat?

A. I believe it does.

Q. Has it got a lower specific heat factor than metal, copper for instance?

A. I would say that it does; yes, sir.

Q. Does your company not claim that thin walled rubber hose must be used inside the refrigerators operating below [108] freezing?

A. Yes, we teach them to use rubber hose; yes, sir.

Q. And does your company not claim that the drain and supply hose must have a fall of not less than one and one-half inches for each foot of length?

A. That is correct.

Q. Why do you claim that?

A. Merely to provide adequate drain for the supply water and the drain water.

(Testimony of H. T. Jarvis)

Q. What is the diameter, the necessary diameter, of the conduits?

A. They vary with every size coil we make.

Q. The water conduits I am talking about.

A. That is what I am talking about also.

Q. Is there any relation necessary relation, between the diameter and the length of the hose as far as the defrosting is concerned?

A. Not within reasonable limits; no, sir.

Q. Well, now, what do you mean by reasonable limits?

A. Well, I mean by reasonable limits if you connected a hose a mile long onto this gadget you wouldn't get enough water through to ever defrost the coil because your pressure drop would be so great.

Q. From a point of view of draining your drain pan and your spray header, is there any necessary relation between [109] the length and the diameter of the hose?

A. I am sorry, I don't believe I understand your question.

Mr. Neave: Do you want the question read?

The Witness: Yes.

The Court: I think we might have a short recess.

(Short recess.)

Mr. Neave: I think there is an unanswered question.

(The question referred to was read by the reporter, as follows:

("Q. From a point of view of draining your drain pan and your spray header, is there any necessary relation between the length and the diameter of the hose?")

The Witness: I don't understand that question.

(Testimony of H. T. Jarvis)

By Mr. Neave:

Q. Well, from the point of view of draining your defrosting unit, does it make any difference how large or how small the diameter of the hose is?

A. Yes, it does.

Q. How large does it have to be?

A. The drainage holes must be large enough to more than take away the quantity of water supplied to the spray pan so that it will never overflow.

Q. Does it make any difference how long the hose is?

A. Yes, I believe it would. [110]

Q. How long does it have to be?

A. Long enough to get on the outside of the low temperature refrigerator.

Q. From the place it is draining?

A. That is right.

Q. Is the spray header entirely enclosed except for the draining holes and the opening for the water to go into it?

A. It is not closed.

Q. It is open on the top?

A. The one we use the most of is wide open. In some instances we use spray headers instead of the pan.

Q. That is, no pan in at all?

A. No pan at all; that is right.

Q. Do you use, or have you ever used, any where it is enclosed on the top and on the sides?

A. Yes, we have.

Q. How does the water drain out of that header?

A. On a pipe that is used for spraying water over the coils where it is entirely closed, it is necessary to put the pipe in on an angle so that the end of the pipe is higher

(Testimony of H. T. Jarvis)

than the inlet and then drill a small hole at the end for an air vent so that the water will drain back out of the supply pipe.

Q. It isn't clear to me where the small hole is, on the [111] end of what?

A. On the end of the supply spray.

Q. Well, now, by that you mean on the end of the header? A. Yes, sir, it could be called a header.

Q. How deep is that header, approximately?

A. That would depend on the size of the coil.

Q. I suppose this hole is in the side toward the top of the header, is that right?

A. That is the usual place to put it.

The Court: What is the header?

The Witness: He is referring to instead of an open pan that we normally use, your Honor, for a shower head spray over this coil we sometimes use a spray header, or just a piece of pipe.

The Court: That is 14 in the patent?

Mr. Neave: That is correct, your Honor.

The Court: That is what you are talking about?

Mr. Neave: That is what I am talking about.

Your Honor, we will have quite a few exhibits to offer in connection with our depositions. Now those exhibits are numbered from 1 up and they are referred to in the depositions by number. It seems to me it might be convenient to keep those exhibit numbers.

The Court: Yes, we will. Have you prepared a type-[112] written list of those?

Mr. Neave: We have them. I don't know that we have them right here.

(Testimony of H. T. Jarvis)

The Court: If you will prepare a typewritten list indicating the depositions and hand them to the Clerk, it will facilitate the matter of keeping records; also one to counsel and one to me, so that whenever you are talking about an exhibit I can have reference to what it is from a short description of it.

Mr. Neave: I would like to have identified now some papers, and I would suggest that perhaps we could start numbering these at the one hundred mark, let us say.

The Court: How many depositions do you have?

Mr. Neave: We have quite a few of them. The exhibits don't go up to 100. There are about 72 exhibits.

The Court: How many deposition do you have which have exhibits attached to them?

Mr. Neave: I think all of the depositions have some exhibits.

The Court: And how many exhibits do you have now?

Mr. Neave: About 72, I believe, your Honor.

The Court: About 72.

Mr. Neave: Yes, I am not positive.

The Court: Perhaps it might facilitate matters if you would take your depositions in order and serially number each [113] one differently, that is, deposition 1, 101, the next deposition would be 201, and so on down to 2501, or whatever it is.

Mr. Lewis Lyon: I think they all usually have an initial before the number, do they not?

Mr. Neave: No, they don't. Only one of them. There are 27 witnesses.

The Court: And each one has depositions?

(Testimony of H. T. Jarvis)

Mr. Neave: Each one had a deposition. I would suggest, if it is convenient to your Honor and counsel, that the exhibits offered or identified during the depositions run as the exhibit numbers given to them there.

The Court: They are given a chronological number in each deposition?

Mr. Neave: No, they run all the way through starting at 1 and going through 72 so that the whole lot of them follow chronologically. [114]

The Court: All right. Then if you leave them that way, I think you can segregate them by taking your first deposition and calling that 1-A, which we will add for trial purposes, and on down to the twenty-seventh, and you can call that 1-AA.

Mr. Neave: Yes.

The Court: So that when you see an exhibit number, you will have your key list of depositions and you will know it is an exhibit to such-and-such a deposition.

Mr. Neave: The point I am making now, your Honor, is that I want an exhibit number for this exhibit.

The Court: All right. What is it?

Mr. Neave: Shall we make it No. 100?

The Court: Is that in the deposition?

Mr. Neave: No, it is not. It has nothing to do with a deposition.

The Court: Very well. We will start yours with 100, serial number 100.

Mr. Neave: All right. I would like to have marked as Plaintiff's Exhibit No. 100, for identification, the title page and pages 592 and 594 of Kent's Mechanical Engineers Handbook.

The Clerk: Do you want this as one exhibit?

(Testimony of H. T. Jarvis)

Mr. Neave: Yes.

The Court: Yes, No. 100. [115]

(The document referred to was marked as Plaintiff's Exhibit No. 100, for identification.)

The Court: Do you have copies?

Mr. Neave: I have, your Honor, but I haven't got them here. I didn't know I was going to use it at this moment.

Q. By Mr. Neave: Mr. Jarvis, I show you Plaintiff's Exhibit 100, for identification, pages 592 and 594, and call your attention on page 592 to Table 1, showing the specific heat of copper at .0951, and on page 594 in Table 6 showing the specific heat of rubber at .481, and ask you if you disagree with those figures.

Mr. Lewis Lyon: Your Honor, I will have to object to that as not cross examination. We didn't go into the question of the specific heat of anything with this witness on direct examination.

Mr. Neave: The witness is qualified as an expert, and I am testing his qualifications.

Mr. Lewis Lyon: As to an expert on specific heat, or anything of that kind? No.

Mr. Neave: On refrigeration.

Mr. Lewis Lyon: That is certainly not cross examination.

The Court: You asked him if he made this contraption. Excuse me for calling it a contraption.

Mr. Lewis Lyon: That is all right.

The Court: I can't think of any other name. This machine [116] under the patent.

Mr. Lewis Lyon: That is correct.

(Testimony of H. T. Jarvis)

The Court: And whether he sold them, and under the patent it says that this will be made of rubber. So you opened the door. The objection is overruled.

Q. By Mr. Neave: Will you answer the question?

A. Will you read the question, please?

(The question was read.)

A. I have no reason to disagree with them.

Q. You don't know whether they are right or not?

A. I don't, no, sir.

Q. When you buy motors for your units, do you get a guarantee from the manufacturer?

A. Yes, we do.

Q. When you defrost a unit, what is the proper practice as to when the unit should be defrosted?

A. Well, our teaching is to the effect that on zero degrees or lower the unit should be defrosted once every 24 hours. However, every job is different in that it is used more often than others, and the amount of storage, and in some jobs it can go as long as two or three weeks without defrosting, but the common practice is once in every 24 hours.

Q. Is it good practice to let the unit accumulate ice on the evaporating coils?

A. It is very bad practice. [117]

Q. What does the term "thermosyphonic" mean?

A. I don't believe I am qualified to answer it.

Q. Well, on the units that you sell do you have a thermosyphonic flow of air over the coils?

Mr. Lewis Lyon: I think that is obviously out of order. The witness has said that he doesn't feel qualified to answer what the term means, so how could he say whether he had or not?

(Testimony of H. T. Jarvis)

The Court: Are you objecting?

Mr. Lewis Lyon: Yes, your Honor.

The Court: On what ground?

Mr. Lewis Lyon: On the ground that the witness is obviously not qualified to answer the question.

The Court: Sustained.

Q. By Mr. Neave: Do you know whether or not there is a thermosyphonic flow of air on the coils?

Mr. Lewis Lyon: The same objection, your Honor.

The Court: He asked whether he knows.

Mr. Lewis Lyon: And he says he doesn't know what the terms means.

The Court: Yes, he said he doesn't know what "thermosyphonic" means.

Mr. Lewis Lyon: The same objection, your Honor.

Mr. Neave: I think the witness can answer whether he knows or not. [118]

The Witness: The only way I can answer, if that will suffice, is to tell you air does go over the unit.

Q. By Mr. Neave: Does what?

A. Does go over the coils.

Q. And is that due to the action of the fan?

A. That is correct.

Q. Referring to Defendant's Exhibit H, which is the license agreement between Refrigeration Engineering, Inc. and McQuay, Inc., dated January 2, 1942, I note that paragraph 5 in part reads as follows:

"The license here granted by Licenser to Licensee is conditioned, and the continuance of the license is conditioned, upon Licensee selling devices under the terms of this agreement, as covered by said Letters

(Testimony of H. T. Jarvis)

Patent No. 2,219,393, at prices not less than that set forth in the schedule of prices as shown by the schedule hereto annexed and marked Exhibit 'A' and made a part hereof."

I show you this Exhibit A of Defendant's Exhibit H, and ask you whether those are the schedules of prices under the license agreement.

A. In order to answer your question, I might tell you that on advice of counsel that privilege to change the prices was withdrawn.

Q. And when was that? [119]

A. Very shortly after the license to McQuay, Inc. went into effect.

Q. Do you recall what date it was withdrawn? This is January 2, 1942, the date of the license.

A. I am sorry, sir. I don't recall the exact date.

Q. What about the other licenses that you granted, Defendant's Exhibit E, F, G, I, J, K, and L, for identification? Do they all contain such a provision?

A. They all do contain such a provision, and they were all withdrawn at the same time.

Q. For how long did you fix prices under any of these license agreements?

A. From the date that the license was made until they were withdrawn.

Q. Well, were they all withdrawn at the same time?

A. I believe they were, sir.

Q. What is the date of the earliest license agreement?

A. I would have to refer to the licenses to answer that question.

(Testimony of H. T. Jarvis)

(The documents referred to were handed to the witness.)

The Court: Are those all the license agreements that your company has?

The Witness: Yes, sir, they are.

The Court: Or have had?

The Witness: Yes, your Honor. Would you read the question [120] again?

The Court: What is the date of the earliest one?

Is there some reason why he has to answer that? Can't you look at them and pass on to something else?

Mr. Neave: I don't know whether they are going to get into evidence or not. If I knew they were going to be offered in evidence, I wouldn't care. They are only marked for identification.

The Court: Do you intend to offer them? Did you intend not to offer them?

Mr. Lewis Lyon: No, I didn't intend not to offer them. I merely took your suggestion, your Honor, of offering one as typical of the group. Rather than encumber the record with all of them, I put in one as representative.

The Court: Very well.

Q. By Mr. Neave: What was the date?

A. July, 1941, appears to be the oldest license.

Q. And what is the licensee?

A. Kramer-Trenton Company, Trenton, New Jersey.

Q. So that from that date until sometime in 1942 you fixed the prices at which your licensees in that period sold the patented devices?

A. I don't recall the date at which that price-fixing, so-called, was withdrawn.

(Testimony of H. T. Jarvis)

Q. Well, between the date of that earliest license and [121] the date it was withdrawn you did fix the prices?

A. We carried out the agreements in exact accordance with the way our counsel drew them up.

Q. Then Schedule A is a price schedule of minimum prices; isn't that correct? A. Yes, sir.

Q. And Schedule A of the license agreement of July 1, 1941, to Kramer-Trenton Company is the same, is it not,—

Mr. Neave: Well, your Honor, it appears that this agreement, Defendant's Exhibit K, for identification—I will take that back. It does have a schedule.

Q. By Mr. Neave: (Continuing) Will you compare the Schedule A of Defendant's Exhibit K, for identification, with that of the Schedule on Exhibit H, and tell me whether they are alike.

A. No, they do not appear to be identical.

Q. But Schedule A is a schedule of prices?

The Court: What is the materiality of all of this?

Mr. Neave: Well, the materiality, your Honor, is this.

The Court: Is it discrimination?

Mr. Neave: May I ask one more question before I explain?

The Court: All right.

Q. By Mr. Neave: Isn't it a fact, Mr. Jarvis, that the granting and acceptance of these licenses by these licensees was materially affected by the fact that you had a price [122] control provision in these license agreements?

The Court: Let me hear that question.

(The question was read.)

(Testimony of H. T. Jarvis)

Mr. Lewis Lyon: I would like to object to that, your Honor, as trying to get this witness to testify what was in the back of the mind of the other party to the agreement.

The Court: I don't understand the question. Maybe the witness does.

The Witness: I don't your Honor.

The Court: That licenses or licensees were not materially affected—

Mr. Neave: Let me ask this question.

The Court: The objection is sustained. [123]

Mr. Neave: Let me ask another question.

Q. Mr. Jarvis, in negotiating these licenses, did you not use as an argument in obtaining licensees the statement that you were going to control the price of these units?

A. I did not have any arguments with any of these licensees and I did not to my knowledge even refer to the price fixing. The contracts were presented as our attorney, Mr. Lyon, drew them up and they were signed as they were drawn.

Q. And they did contain these price fixing provisions?

The Court: That speaks for itself.

By Mr. Neave:

Q. Your company prosecuted the McAdam patent, did it not?

Mr. Lewis Lyon: That is objected to as not cross examination, your Honor.

The Court: Overruled.

Mr. Lewis Lyon: As to what company prosecuted the application?

The Court: Perhaps you are speaking in a technical sense. One of your opening questions was, what has he

(Testimony of H. T. Jarvis)

to do with this, and he assigned chief engineer McAdam to work on it, and the patent was the result. [124]

Mr. Lewis Lyon: That is correct. This is a technical question of asking who presented the application to the patent office and who prosecuted the application before the patent office. It is certainly not cross examination of any question that was asked of this witness.

Mr. Neave: I think perhaps I can change the question a little bit, your Honor.

Q. You owned the application of the McAdam patent, did you not? A. The corporation owns it.

Q. The corporation? A. Yes.

Q. Now do you know whether or not during the prosecution of the application in the patent office, the company, your company, asked for method claims to be granted to it?

The Court: Your company asked for method claims?

Mr. Neave: To be granted to it in this application.

The Court: To the company as separate from the patentee?

Mr. Neave: As separate from the patentee.

The Court: To be granted to the patentee.

Mr. Neave: To be granted to the patentee; that is right.

Mr. Lewis Lyon: I think the best evidence of that is the file wrapper, which is usually produced. This witness [125] has not been qualified to answer such a question.

The Court: He hasn't been qualified, but he is asking him whether or not he knows. Objection overruled.

Do you know?

The Witness: I don't know. It was handled between Mr. McAdam and Mr. Lyon, your Honor.

(Testimony of H. T. Jarvis)

The Court: Mr. McAdam is the chief engineer for your company?

The Witness: Yes, sir. At the time of this patent matter he was, and he turned over all the test information and the results of our findings to Mr. Lyon.

The Court: Did he conduct experiments?

The Witness: Yes, sir; he did.

The Court: When did you first assign him to the matter of trying to work out this problem?

The Witness: Early in 1937.

The Court: Early in 1937?

The Witness: Yes, sir.

The Court: You paid for all of his experiments?

The Witness: We certainly did.

The Court: The money necessary and the where-withal?

The Witness: Yes, sir. And he conducted the tests right in our own laboratory.

Mr. Neave: That is all.

The Court: Redirect? [126]

Mr. Lewis Lyon: Yes, your Honor.

Redirect Examination

By Mr. Lewis Lyon:

Q. On cross examination you were asked if you had ever brought suit against any purchaser of your units. You have sold your water defrost unit to the York Company, the plaintiff in this action, have you not?

A. Yes, sir.

(Testimony of H. T. Jarvis)

Q. Will you refer to your records and determine when the first such sale was made? I believe you had the list in front of you.

A. I am sorry. It is over on the table there. Will you give it to me, please?

(The document referred to was passed to the witness.)

The Witness: I believe the first sale to York Ice Machinery Company was 10-30-39.

By Mr. Lewis Lyon:

Q. But the sale on 8-25-39, Mr. Jarvis, was installed in the Beverly Market in West Los Angeles, was it not?

A. Yes, I beg your pardon. There is a previous sale; 8-25-39.

Q. Did you ever bring suit against the York Company because of their purchase of that unit from you?

A. No, sir; we did not.

Q. Or any other unit, did you? [127]

A. Not of our manufacture; no, sir.

Q. When did you first learn that the York Company, plaintiff, was manufacturing water defrost units in their own behalf?

A. During the war; during this last war.

Q. What type of structure?

The Court: That was a long war.

By Mr. Lewis Lyon:

Q. Let us bring it down closer then. When was that as near as you can recall, Mr. Jarvis?

A. I believe it was early 1943.

(Testimony of H. T. Jarvis)

Q. Will you state the circumstances of obtaining that knowledge?

A. Yes. I was at the York plant, York, Pennsylvania, and saw them going through that plant quite a large order for portable refrigeration low temperature units for the Navy.

Q. I hand you a photograph, Mr. Jarvis—

The Clerk: M for identification.

(The photograph referred to was marked Defendant's Exhibit M for identification.)

By Mr. Lewis Lyon:

Q. I will ask you if you know what is shown in that photograph now marked Exhibit M for identification.

A. Yes, sir, I do know what is shown there. [128]

Q. How does the unit shown in this photograph compare with the unit that you personally observed going through the York plant at York, Pennsylvania?

A. As far as the machinery goes, it is an identical hook-up. There was one exception, that the later Navy units used a smaller plug than this unit that is shown here. That is the insulated plug.

Q. Do you know anything about the development or use, the development of that equipment as shown by the photographic Exhibit M for identification, and its introduction to the armed services? A. Yes, sir; I do.

Q. Will you state the circumstances of that introduction?

A. I personally called on Captain Shuey of the Navy in Washington to try and convince them to use water defrost coils. I made three trips and after the third trip he gave the Weber Showcase Company here in Los An-

(Testimony of H. T. Jarvis)

geles the original order for, I believe, 21 of these units, and this picture that I have in my hand is of the first unit of this type that was ever built.

The Court: Let me see it.

(The document referred to was passed to the court.)

Mr. Lewis Lyon: Will you mark this N for identification? [129]

The Clerk: N for identification.

(The document referred to was marked Defendant's Exhibit N for identification.)

The Court: This is a picture of the compressor side, this isn't a picture of the freezing coil.

The Witness: The freezing unit, your Honor, is mounted on the other side of that panel.

By Mr. Lewis Lyon:

Q. I will hand you another photograph, Mr. Jarvis, marked N for identification and will ask you if you are familiar with what is shown in that photograph.

A. Yes, sir; I am.

Q. What is shown in that photograph?

A. A sectional low temperature walk-in box as used by the armed forces.

The Court: Let me see it.

(The document referred to was passed to the court.)

Mr. Lewis Lyon: I want to ask that these be marked separately for identification.

The Clerk: O, P, and Q for identification.

(The documents referred to were marked Defendant's Exhibits O, P, and Q for identification.)

(Testimony of H. T. Jarvis)

By Mr. Lewis Lyon:

Q. I show you these drawings which have been marked Exhibits O, P, and Q for identification, and will ask you if [130] you are familiar with these drawings.

A. Yes, sir; I am.

Q. What do those drawings show, and do those drawings have any relationship as to the structure shown by the photographs, Exhibits M and N for identification?

A. These drawings are of the first units that we built for the Navy job—the Marines, I beg your pardon.

Q. And those units went into the jobs as shown by Exhibits M and N, did they not?

A. That construction; yes, sir.

Q. These drawings, Exhibits O, P, and Q show the construction of the water defrost units used in those Marine boxes shown by Exhibits M and N, do they?

A. Yes, sir.

The Court: When was M taken and N? What date?

Mr. Lewis Lyon: I will probably have to establish that by another witness, Mr. Carl Weber, who will be here.

The Court: Very well.

Mr. Lewis Lyon: I think they are marked on the back, but this witness I don't believe knows.

The Court: When were those drawings finished? Are they dated?

The Witness: Yes, your Honor. One is dated 10-21-41, the other one 4-14-43, and the other 12-17-41.

Mr. Neave: We can't tell which is which. [131]

The Court: You mean you can't tell which is O, P, and Q?

(Testimony of H. T. Jarvis)

Mr. Neave: Which date applies to which exhibit.

Mr. Lewis Lyon: Exhibit P for identification is dated 10-21-41; Exhibit O is dated 12-17-41; Exhibit Q is dated 4-14-43.

Q. Mr. Jarvis, does Exhibit O correctly illustrate the type of pump that was used in these jobs?

A. Well, it appears to be a very poor drawing of the type of pump that was used.

Q. What type of pump was used?

A. An old-fashioned hand pump as sold by Sears & Roebuck and used out on the farms.

Q. That is an old farm pump that used a hand-operated lever? A. That is right.

Q. And a reciprocating type of pump, is that correct?

A. Yes, sir. I believe this drawing was of a different type of pump that showed a little different handle arrangement.

Q. That hand pump that you now refer to is shown in the lower right-hand corner of Exhibit M, is it?

A. Yes, sir; that is the type of pump that was used.

The Court: That is the pump that you pump the water in with? [132]

The Witness: That is right.

The Court: That is not the pump to keep the refrigerant solution going through?

The Witness: No, sir; just the water.

Mr. Lewis Lyon: Do you know whether the services were standardized on any type of refrigeration equipment after you introduced this water defrost to them, Mr. Jarvis?

The Witness: I am sorry, Mr. Lyon. I didn't hear the question.

(Testimony of H. T. Jarvis)

(The question referred to was read by the reporter, as follows:

("Q. Do you know whether the services were standardized on any type of refrigeration equipment after you introduced this water defrost to them, Mr. Jarvis?")

The Witness: To my knowledge, all of the armed forces specified water defrost without an alternate for all of their portable low temperature units after the Marines successfully used this installation referred to.

By Mr. Lewis Lyon:

Q. Do you have any knowledge of York Corporation plaintiff having ever manufactured or sold a water defrost system prior to the time that you saw these service boxes going through the plant of the York Corporation at York, Pennsylvania? A. No, sir, I do not. [133]

Q. Mr. Jarvis, with respect to this clause 5 of the existing agreements with your licensees, did you ever at any time modify, change or in any way try to enforce any price control with respect to the operations of the licensees under those agreements?

A. Not at any time.

Q. Did you ever find out what the licensees were charging for the units with reference to any of these agreements? A. No, sir.

Q. On direct examination I believe you were asked a question as to whether or not you advocated that in connection with the water defrost system that rubber hose must be used, is that correct?

A. I was asked such a question; yes, sir.

(Testimony of H. T. Jarvis)

Q. Do you make installations using both metal pipe and rubber and other types of conduit?

A. A great many of them are installed with steel pipe, and we still recommend in our catalog the use of rubber pipe, or rubber hose.

Q. Your recommendations are set forth in your catalog, they are to set forth a set of conditions which you know, if they are followed, will without doubt operate, is that correct?

Mr. Neave: I object to the leading form of the question.

The Court: Yes, that is leading. Objection sustained.

Mr. Lewis Lyon: I will withdraw it.

Q. Why do you set forth particular operating conditions in your catalog, Mr. Jarvis?

A. So that our coils will function properly in the field, and in the case of recommending hose versus pipe, hose does not collect condensation on the outside of the box like steel pipe does, and that is why basically we recommend hose.

Mr. Lewis Lyon: That is all.

The Court: Recross?

Mr. Neave: Yes, sir.

Mr. Lewis Lyon: Your Honor, I might offer at this time Exhibits M, N, O, P and Q in evidence as Defendant's Exhibits with those letters.

The Court: Admitted.

(The documents referred to were received in evidence and marked Defendant's Exhibits M, N, O, P and Q.)

[Note: Defendant's Exhibits M, N, O, P and Q will be found in the Book of Exhibits at pages 1493, 1494, 1495, 1496 and 1497.]

(Testimony of H. T. Jarvis)

Recross Examination

By Mr. Neave:

Q. I understood you to say on cross examination that you made no installations yourself, that is, your company did not install these units. That is correct, isn't it?

A. That is correct. We do not install them ourselves. [135]

Q. And you don't sell any rubber hose?

A. We do not sell any rubber hose.

Q. Now when you said that the armed forces specified water defrost on all portable units, you don't mean to imply that they specified water on all units, just for the portables?

A. I mean to imply and state that to my knowledge on all low temperature jobs that the specifications that I saw after the date of this Marine job specified water defrost. [136]

Q. On small portable units?

A. On all low temperature jobs, whether it was small and portable, or whether it was one that was assembled overseas.

Q. Was that the Army?

A. The Army, the Navy, the Maritime Commission and the Quartermaster.

Q. Did you see all of the specifications, all of the orders?

A. No, sir, that would be quite impossible for one man, to see all the orders that came out of Washington for refrigeration alone during this war.

Q. Your statement is based only on the ones that you saw? A. That's right.

(Testimony of H. T. Jarvis)

Q. Now, I think you mentioned that you had filed a suit on this patent against Acme Scale & Fixture Company; is that correct? A. That is correct.

Q. And that suit was filed on December 22, 1941?

A. The date I wouldn't be able to verify.

Q. It was about that time? Do you recall that?

A. I would say that that date might be correct.

Q. What happened to that suit, do you recall?

Mr. Lewis Lyon: That is objected to as certainly not sur-rebuttal, your Honor, and not a proper method of proof.

The Court: Objection sustained. It is not re-cross. [137]

Mr. Lewis Lyon: Thank you for the correction, your Honor.

Q. By Mr. Neave: I don't think that I understood what you said this Defendant's Exhibit N represented, Mr. Jarvis.

A. It represents a panel on which is mounted a refrigeration condensing unit, with a gasoline engine, and the water tank and the pump and all belts and controls and fittings to make a complete hook-up to the coil on the other side of the panel.

Q. Who manufactured that unit?

A. Weber Showcase & Fixture. Their nameplate is right here on the photograph.

Mr. Neave: That is all.

Mr. Lewis Lyon: Just one further question, Mr. Jarvis, or one set of questions.

(Testimony of H. T. Jarvis)

Redirect Examination

By Mr. Lewis Lyon:

Q. During the war were you on any government board or government sponsored board with respect to refrigeration?

Mr. Neave: It would seem to me that that is not redirect, your Honor.

Mr. Lewis Lyon: It goes to his knowledge, his source of knowledge, to connect up his other testimony that so far as all contracts that he saw are concerned, they specified water defrost, and to show that he was in a position to see most of [138] them.

The Court: It isn't of any great significance, and the objection is overruled, because we will get rid of it quicker that way than if we argue it out.

Q. By Mr. Lewis Lyon: Will you answer the question? A. I beg your pardon?

Q. Were you on any refrigeration boards during the war?

A. Yes, I was the representative on the General Refrigeration and Air Conditioning Industry Advisory Board, representing this industry in the eleven western states on both refrigeration and air conditioning.

Q. And you continued in that position throughout the war, did you? A. I did.

Q. How often did that position take you to Washington? A. Once a month, with few exceptions.

Q. How long each month were you there?

A. I was gone from my office on an average of one week out of every 30 days.

(Testimony of H. T. Jarvis)

Q. During that time you were solely concerned with the problems of refrigeration? A. That is right.

Q. And had an opportunity to see and did see the work that the government was doing with respect to refrigeration? A. That is right. [139]

Mr. Lewis Lyon: That is all.

Recross Examination

By Mr. Neave:

Q. Were you consulted by the armed forces as to the type of defrosting that should be put in their units?

A. I don't believe that I was while representing the industry on this committee, if that is what you refer to.

Mr. Neave: That is all.

The Court: That is all. Step down.

How many witnesses do you have all together?

Mr. Lewis Lyon: About seven or eight, your Honor, unless I can cut them down.

The Court: How many do you have in the flesh?

Mr. Neave: I don't think that we will have more than one, and possibly not even one in the flesh.

The Court: And you have twenty-seven depositions, you say?

Mr. Neave: Yes, sir.

Mr. Lewis Lyon: Your Honor, at this time I would like to introduce into evidence page 101-B of Section 210-A, dated February 1, 1936, taken from the York Corporation Instruction Manual as the defendant's exhibit next in order, and I am producing that particularly for the purpose of the York instructions on defrosting.

The Court: Any objection? [140]

Mr. Neave: Yes. I would like to know—

The Court: I don't know. You haven't laid any foundation. I mean, how could I know, or anybody else know?

Mr. Lewis Lyon: I don't believe there is any objection to the fact that it is that. I submitted this to Mr. Neave before, and it is admitted that it is a part of their catalogue.

The Court: Your objection is on other grounds?

Mr. Neave: Yes. So far as the authenticity of this document is concerned, why, we admit it is a York publication.

Mr. Lewis Lyon: And that it came out of the York Instruction Manual.

Mr. Neave: That is correct. My objection to it is that there is no relevance to any issue in this case, as to what is in this manual.

The Court: Let me see it.

(The document referred to was handed to the court.)

Mr. Neave: I am told, your Honor, that it came out of a price book and not the Instruction Manual, for the purposes of accuracy.

The Court: This says "Outside Air Defrosting" and "Hot Gas Defrosting." What is the purpose of showing this,—infringement?

Mr. Lewis Lyon: The material portion is to show what the instructions were, particularly the part I have marked there, where there is a statement— [141]

The Court: I see. "On installations with room temperatures below 32° F., the drain line must be omitted as it would be frozen shut."

Mr. Lewis Lyon: Yes, showing the teaching that if you used water you would freeze yourself up tight. That is made on February 1, 1936, by York Corporation.

The Court: 5-1-33, it says. Oh, "supersedes," I see. The objection is overruled. It is admitted. That is Exhibit R?

The Clerk: Yes, your Honor.

(The document referred to was marked as Defendant's Exhibit R, and was received in evidence.)

[Note: Defendant's Exhibit R will be found in the Book of Exhibits at page 1498.]

Mr. Neave: May I take it that my objection runs to all of this line of exhibits?

The Court: If there is a line.

Mr. Lewis Lyon: Yes, there are several of them.

Mr. Neave: I believe there is a line, your Honor.

The Court: Yes, the same objection and the same ruling.

Mr. Neave: Very well.

Mr. Lewis Lyon: I will also offer at this time page 43 of Section 160 of the same manual, dated December 21, 1934, also having to do with the teachings of the York Corporation with respect to defrosting. And on that I want to say that I am offering both sides of that page, including both pages 43 and 44. [142]

The Clerk: Defendant's Exhibit S.

(The document referred to was marked as Defendant's Exhibit S, and was received in evidence.)

[Note: Defendant's Exhibit S will be found in the Book of Exhibits at page 1500.]

Mr. Lewis Lyon: From the same manual I am offering the next exhibit—

The Court: Exhibit T.

Mr. Lewis Lyon: —T, a circular entitled, "York Utility Air Cooler," bearing the copyright date, "Copyright, York Ice Machinery Corporation, 1934," and particularly the section of that page dealing with defrosting, as marked.

The Clerk: Defendant's Exhibit T.

(The document referred to was marked as Defendant's Exhibit T, and was received in evidence.)

[Note: Defendant's Exhibit T will be found in the Book of Exhibits at page 1502.]

Mr. Lewis Lyon: Also, I would like to advise plaintiff's counsel at the present time of our intention to utilize the article, as it appeared in "The Ice Cream Review," issue of September, 1934, which article is entitled, "Methods of Defrosting Various Types of Hardening Room Coils," by John C. Consley, Engineering Division, York Ice Machinery Corporation.

The reason I am not offering it at the present time is [143] that I do not have copies, and I will try to get them this evening for you.

There is no question, Mr. Neave, is there, but what York Ice Machinery Corporation and York Ice Machinery are the same corporation?

Mr. Neave: The same company.

Mr. Lewis Lyon: Does your Honor desire me to put on futher witnesses this evening?

The Court: No. I think we will recess now until 10:00 in the morning. Do you think you will be able to close this case this week?

Mr. Lewis Lyon: I will do my best, your Honor, but I sincerely doubt it.

The Court: With twenty-seven depositions.

Mr. Lewis Lyon: It depends on what your Honor's desires are with respect to the depositions probably.

The Court: I think that I would rather have the depositions read.

Mr. Lewis Lyon: I agree with you. How many pages are there, Mr. Neave, five hundred and some?

Mr. Neave: I think there are more than that. I think it would be wise if they were read, in view of the fact that they compromise the major part of our case, aside from the publication of the patents.

Mr. Charles Lyon: It took me a week to read them, just [144] sitting by myself.

Mr. Lewis Lyon: You are a slow reader.

The Court: Ten o'clock in the morning, gentlemen.

(Whereupon, at 4:30 o'clock p. m., September 17, 1946, an adjournment was taken until 10:00 o'clock a. m., September 18, 1946.) [145]

Los Angeles, California; September 18, 1946; 10:00 o'clock A. M.

The Clerk: York Corporation v Refrigeration Engineering, Inc., for further trial.

The Court: Proceed.

Mr. Lewis Lyon: Your Honor, before proceeding, there are a few matters that I noticed in the daily transcript that I would like to call to the court's attention. One is that at the top of page 143, in the introduction of that exhibit, I am afraid there might be a misinterpretation of the court's statement. I appreciate the court's purpose in making that statement, and perhaps I misspoke myself, because it might confuse the record later. I think both sentences could go out.

The Court: All right. It may be stricken. I will just draw a line through it.

Mr. Lewis Lyon: Also in the record on the next page my older brother, Leonard Lyon, appears mysteriously. He hasn't been here. That was me speaking at that time.

The Court: Motion granted. There are two places there.

Mr. Lewis Lyon: Yes.

There is one other part of the record, the discussion between Mr. Neave and myself with respect to the identity of the York Ice Machinery Corporation and the York Corporation. [149] plaintiff in this action, being one and the same.

(Addressing Mr. Neave) That was your understanding of that statement, wasn't it, Mr. Neave?

Mr. Neave: That is right. Where is that, what page?

Mr. Lewis Lyon: The correct statement is that the York Ice Machinery Corporation referred to in these exhibits is the same as York Corporation plaintiff. That is correct, is it not?

Mr. Neave: That is correct.

The Court: That stipulation will now presently clarify any misstatement or misrecording that might be in the record.

Mr. Lewis Lyon: Thank you.

Mr. Neave: There are a number of other corrections I think that ought to be made, but I don't know whether your Honor wants to take them up now or not.

The Court: How many are there?

Mr. Neave: Just a few. On page 138, line 20, the statement there, "Mr. Neave: It would seem to me that that is re-direct, your Honor," that should be: "It would seem to me that that is not re-direct, your Honor."

The Court: Very well.

Mr. Neave: Rather than take up your Honor's time, I might mark this later and bring it to your attention.

The Court: Very well.

Mr. Lewis Lyon: I haven't gone through the transcript [150] in full either. I notice one or two other slight errors.

At this time I would like to call Mr. Howard Lawrence, please.

HOWARD B. LAWRENCE

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name.

The Witness: Howard B. Lawrence.

The Court: L-a-w-r-e-n-c-e?

The Witness: Yes, sir.

The Clerk: And your address?

The Witness: Business address is 3388 South Robertson Boulevard.

The Clerk: Los Angeles or Beverly Hills?

The Witness: Los Angeles 34.

The Clerk: Take the stand, please.

Direct Examination

By Mr. Lewis Lyon:

Q. Will you state your occupation, Mr. Lawrence.

A. I am an ice cream manufacturer.

Q. How long have you been in that business?

A. Since 1932.

Q. Under what company name do you conduct your business?

A. The Dutch Maid Ice Cream Company. [151]

Q. In conjunction with that business, do you operate or maintain an ice cream hardening room?

A. Yes, sir.

Q. How long have you had such an ice cream hardening room? A. Since 1932.

Q. Originally what type of refrigeration means did you have in that ice cream plant hardening room?

A. We had iron pipe coils.

(Testimony of Howard B. Lawrence)

Q. Where were those pipe coils extended in the room?

A. There were banks of coils in the ceiling and also on the walls as shelves but they were all hooked to the refrigeration system.

Q. Did or did not those pipes collect frost?

A. Very much.

Q. How was that frost removed?

A. The frost was removed by stopping the ammonia compressor, shutting down the plant completely, and scraping the coils with some steel instrument, or knocking the frost off that had become softened or warmed up. The frost develops into ice after a period of time and you lose refrigeration.

Q. Did the operation of removing that frost cause a rise in temperature of the ice cream hardening room?

A. Oh, very definitely.

Q. Was it necessary to remove the ice cream from the [152] room during defrosting?

A. It was advisable for the preservation of the ice cream.

Q. In November of 1939 you installed a different form of refrigeration in your ice cream hardening room, did you?

A. At that time we built a new factory and installed a new type of refrigeration.

Q. What type of refrigeration was that, Mr. Lawrence?

A. It was a water defrost coil system.

Q. When did you first become acquainted with such a system of defrosting?

A. It was prior to November of '39. We were building the building and looking for something more satis-

(Testimony of Howard B. Lawrence)

factory than the pipe coils, and we had always dealt with the Creamery Package Manufacturing Company. They had heard of a new type of coil that was being put on the market, and we were definitely interested in something better than what we had.

Q. Did you make any investigation of such water defrost system? A. Yes, I did.

Q. In that regard, what did you do?

A. There wasn't any installation in Southern California in a low temperature room such as our requirements were. There were warm rooms, I mean up around 40 degrees temperature, but our requirements were 20 degrees below zero, and [153] there weren't any installations of that type in Southern California. We heard of one that was installed in Fresno and we made a trip up there to Fresno to observe the operation.

Q. By "we" who do you mean, Mr. Lawrence?

A. It was the Velvet Ice Cream Company in Fresno.

Q. You say "we went up to Fresno." Who do you mean?

A. I took my plant manager with me.

Q. And yourself? A. Yes, sir.

Q. And you saw such a water defrost system in operation at the Velvet Ice Cream Company in Fresno, did you?

A. Yes, sir.

Q. Did you see that plant demonstrated in operation?

A. Yes, sir.

Q. Did you also request of Creamery Package Company and the manufacturer of Refrigeration Engineering a guarantee as to the operation of that equipment for your operations before you would permit its installation?

A. Yes, I did.

(Testimony of Howard B. Lawrence)

The Court: Did Refrigeration Engineering, the defendant in this case, install your defrosting system in 1939?

The Witness: No, your Honor. The system was installed by the Creamery Package Manufacturing Company.

The Court: Was it the system of the defendant here, the Refrigeration Engineering system, called the McAdam patent [154] system? Do you know it by that name?

The Witness: I don't know it by that name. It was the Recold coil.

The Court: Recold?

The Witness: Yes.

The Court: Is that the name?

Mr. Lewis Lyon: That is the tradename of Refrigeration Engineering.

The Court: Is that stipulated to?

Mr. Neave: Yes, sir.

The Court: Very well.

What was your question now?

Mr. Lewis Lyon: Did he extract a guarantee from both Creamery Package and from Refrigeration Engineering before he would permit installation of the Recold coil?

The Witness: Yes, I did.

The Court: Was it a Recold system in Fresno that you saw?

The Witness: Yes, sir. The application wasn't—it didn't give me a complete picture of the operation. The plant was in operation at the time, but he couldn't shut down to show us the operation, show us how it would defrost the coil, because, you see, he would have had to pull his switch too. But we saw the coil blower system.

The Court: And talked with him about it? [155]

(Testimony of Howard B. Lawrence)

The Witness: And talked with him, and he was satisfied with it.

The Court: Very well.

Mr. Lewis Lyon: Will you mark this, Mr. Clerk?

The Clerk: Defendant's Exhibit U for identification.

(The document referred to was marked Defendant's Exhibit U for identification.)

The Court: I thought we had U last night.

The Clerk: No, T was the last one, your Honor.

The Court: Didn't you mark that article at all?

The Clerk: That is T.

Mr. Lewis Lyon: It wasn't marked, your Honor.

The Court: All right.

By Mr. Lewis Lyon:

Q. I hand you Exhibit U for identification and ask you if you can tell me what that document is.

A. This is a sales slip from the Creamery Package Manufacturing Company for two—do you want the number?

Q. That is all right.

Q. Two No. 2500-LT Recold fan type coils, and one 300 Recold fan type coil.

On this sales slip there is a note at the bottom that "Satisfaction is guaranteed."

Q. Was that slip signed by you?

A. Yes, sir. [156]

Q. Is that a duplicate of any other slip that was also signed at the same time and returned to the Creamery Package Company?

A. Yes. This was my copy of the sales slip. It is a carbon copy.

(Testimony of Howard B. Lawrence)

Q. And by "satisfaction guaranteed," what was your understanding, Mr. Lawrence?

A. I was told that if this type of coil didn't meet my satisfaction the Creamery Package Company would install any type of coil I desired.

Q. Without cost to you?

A. Without cost to me.

Mr. Lewis Lyon: I will offer in evidence the document heretofore identified as Defendant's Exhibit U for identification as Exhibit U.

The Court: Admitted.

(The document referred to was received in evidence and marked Defendant's Exhibit U.)

[Note: Defendant's Exhibit U will be found in the Book of Exhibits at page 1504.]

Mr. Lewis Lyon: Will you mark this, Mr. Clerk?

The Clerk: Defendant's Exhibit V for identification.

(The document referred to was marked Defendant's Exhibit U for identification.)

By Mr. Lewis Lyon:

Q. I hand you a letter, Mr. Lawrence, dated February 27, 1940, and ask you if you can identify that letter? [157]

A. Yes. This letter I wrote to Creamery Package. I understood that they wanted a recommendation or a reference as to my experience with the coils so that they could use it in their business.

Q. Does that letter accurately state the conditions of operation of this Recold unit as you found it at that time?

A. Yes, sir.

(Testimony of Howard B. Lawrence)

Q. Are those units of Recold coils still in operation in your plant? A. Yes.

Q. Are they still operating in accordance with your statement contained in this letter of February 27, 1940?

A. Yes, sir.

The Court: Have they been changed?

The Witness: No, there hasn't been any change on the coils at all. I have changed expansion valves, but that is not a part of the coil.

The Court: Had you had any experience with any other type of defrosting other than the one you had previously used?

The Witness: Your Honor, I don't believe there is any other type of defrosting.

The Court: Well, gas defrosting, brine defrosting.

The Witness: Oh, yes, of the pipe coils.

The Court: Of the pipe coils?

The Witness: Yes. I went to considerable pains trying [158] to find an easier way to defrosting.

The Court: Did you try brine on your pipes, brine defrosting?

The Witness: No, I never tried brine.

The Court: Have you ever tried gas?

The Witness: I have tried gas, I have tried reversing the action of the compressor and forcing hot gas back through the coils to loosen the ice.

The Court: And you disregarded those in favor of scraping it off with a steel instrument, did you?

The Witness: Yes, sir.

Mr. Lewis Lyon: I will offer this letter, Defendant's Exhibit V for identification, as Defendant's Exhibit V.

The Court: Admitted.

(Testimony of Howard B. Lawrence)

(The letter referred to was received in evidence and marked Defendant's Exhibit V.)

[Note: Defendant's Exhibit V will be found in the Book of Exhibits at page 1505.]

Mr. Lewis Lyon: Will you mark these?

The Clerk: Defendant's Exhibit's W and X.

(The documents referred to were marked Defendant's Exhibits W and X respectively for identification.)

By Mr. Lewis Lyon:

Q. I hand you two photographs marked for identification as Defendant's W and X and ask you if you can identify these photographs, Mr. Lawrence. [159]

A. These were taken in my new plant showing the operation of the coils and showing the operation of the water valves.

Q. You are pictured in each of those photographs, are you?

A. Yes, sir.

Q. When were those photographs taken?

A. In the early part of 1940.

Q. Is the photograph, Exhibit W a photograph showing the inside of the ice cream hardening room?

A. That shows the inside of the hardening room with the coils in operation. The hardening room has ice cream in it.

Q. Will you mark, for the purpose of the record, the two Recold coils which show in that picture? Just mark them "R."

A. (Marking on exhibit as requested)

Q. The photograph X for identification shows the outside of that same box, does it?

A. Yes, sir.

(Testimony of Howard B. Lawrence)

Q. And shows the water control valve for letting the water into the Recold unit for defrosting, is that correct?

A. Yes, and also the outlet of the water.

Mr. Lewis Lyon: I will offer the two photographs as identified by the witness in evidence as Defendant's Exhibits W and X. [160]

Your Honor, this is one of the installations which is our desire that your Honor see. I think the photographs will make a record perhaps of what the court has seen, if the court determines it advisable to make the inspection.

The Court: How big is this room?

The Witness: The room is 22 feet long and 9 feet wide and 9 feet high.

The Court: The defrosting coils are at one end of the room only?

The Witness: Yes, sir.

The Court: Admitted.

(The documents referred to were received in evidence and marked Defendant's Exhibits W and X respectively.)

[Note: Defendant's Exhibits W and X will be found in the Book of Exhibits at pages 1507 and 1508.]

Mr. Lewis Lyon: That is all. You may cross examine.

Cross Examination

By Mr. Neave:

Q. Mr. Lawrence, have you been in the ice cream business anywhere but in Los Angeles?

A. No, sir.

Q. Your experience has been only here?

A. Yes, sir.

(Testimony of Howard B. Lawrence)

Q. So far as defrosting and refrigeration is concerned? A. Yes, sir.

Q. In the installation that you had before you bought [161] the Recold unit, as I understand it, you had pipes over the ceiling and walls. Now what did you do when you tried to defrost that by hot gas?

A. We shut off the suction and discharge valves on the compressor, opened the bypass valves on the compressor. That reversed the action of the compressor, sucking the gas from the condenser and receiver and forcing it back into the coils.

Q. You had only one compressor?

A. Yes, sir.

Q. And one condenser? A. Yes, sir.

The Court: Did you remove the commodity from the room?

The Witness: No.

The Court: You did not?

The Witness: No.

The Court: How long did it take to defrost, or did it defrost?

The Witness: It wasn't satisfactory.

The Court: Why wasn't it satisfactory?

The Witness: The hot gas would condense in the coils. The coils were of such lower temperature than the gas it would condense back into liquid.

The Court: In other words, it didn't defrost?

The Witness: Only a part. The first part of the coils would defrost but the last part didn't defrost [162]

(Testimony of Howard B. Lawrence)

By Mr. Neave:

Q. Before you bought this unit from Recold, did you ever see any finned coil unit irrespective of the kind of defrosting unit as distinguished from these pipes throughout the room?

A. Would you repeat that statement, please?

Q. What I am trying to get at is this: Did you ever see a package unit like the Recold unit where the coils are all enclosed and there is a fan back of it?

A. Why, yes.

Q. That is a common type of unit?

A. Well, it wasn't at that time. I stated that I went to Fresno to see one.

Q. You had never seen one prior to that time that you saw the Recold unit? A. No, sir

Q. Or such a unit? A. No, sir.

Q. Irrespective of the type of defrosting?

A. No.

The Court: When you say such a unit, you mean such a unit as the Recold unit? I think counsel is talking about something else.

Mr. Neave: I am talking about a unit that has fin coils and a fan as distinguished from a pipe installation around [163] your room.

The Witness: The only other one I had seen was the one I went to Fresno to see.

By Mr. Neave:

Q. What installations of other manufacturers did you examine before you bought the Recold unit?

A. I don't believe I examined any.

(Testimony of Howard B. Lawrence)

Mr. Neave: May I see Exhibit V?

(The document referred to was passed to counsel.)

By Mr. Neave:

Q. In Defendant's Exhibit V you state, "The unique system of defrosting using sweet water is accomplished in about 5 minutes' time." When you say "unique system" you mean that you hadn't seen one before?

A. It was different from the ordinary or usual type of coil.

Q. And what was the difference? How did it differ?

A. It was a fan type fin coil in comparison with the iron pipe coil that made it unique.

The Court: Had you seen installations in other ice cream freezing rooms in this community?

The Witness: Only the one in Fresno.

The Court: I mean in your business, had you been in to other ice cream manufacturers' freezing rooms?

The Witness: Yes. [164]

The Court: Did they use the pipe system?

The Witness: Yes, sir; entirely.

The Court: Had you been in to, for instance, the Los Angeles Ice & Warehouse Company?

The Witness: Yes, sir.

The Court: What did they use?

The Witness: They used pipes.

The Court: They use the pipes?

The Witness: Yes, sir.

The Court: Very well.

Mr. Neave: That is all.

(Testimony of Howard B. Lawrence)

Mr. Lewis Lyon: That is all, Mr. Lawrence.

The Court: This witness may be excused?

Mr. Lewis Lyon: Yes, your Honor.

The Court: You may be excused.

(Witness excused.)

Mr. Lewis Lyon: At this time, your Honor, I would like to introduce in evidence the article entitled "Methods of Defrosting Various Types of Hardening Room Coils," as it appears in the September 1934 issue of the Ice Cream Review as written by Mr. John C. Consley, engineering division of the York Ice Machinery Corporation, the article appearing upon page 24, 25, 26, and continuing on page 57 and concluding on page 58 of that issue.

The Court: Admitted. [165]

Mr. Neave: May we have a copy of that?

Mr. Lewis Lyon: Yes, I am getting a copy of it. The photostats aren't available yet.

The Court: They will be available today?

Mr. Lewis Lyon: Yes.

Mr. Neave: May I ask the purpose of the introduction?

Mr. Lewis Lyon: The purpose of the introduction is to show a York publication of plaintiff as to the methods of defrosting; also showing the recognition of the York Corporation at the time of the impossibility of such a method of defrosting as is here in issue.

Mr. Neave: There again I would object to the introduction of the document, if it is introduced in any way as proof of any fact stated in that.

The Court: What is it, an admission against interest? Is that your point?

Mr. Lewis Lyon: Yes, your Honor.

The Court: Let me see it.

(The document referred to was passed to the court.)

Mr. Neave: I don't object to it if it is introduced on the ground of showing what was in the article, but if it is introduced as proving any fact why then of course it is hearsay, unless it proves to be an admission.

Mr. Lewis Lyon: It is an admission against interest, your Honor, and also it establishes the state of the art as [166] published by the York Corporation itself as of that date. It is a complete review of the methods of defrosting.

Mr. Neave: But it has to show it is an admission against interest. However, I have no objection to its being part of the state of the art, as you put it.

The Court: It is offered for those two purposes only?

Mr. Lewis Lyon: That is right.

The Court: It will be admitted and limited to those two purposes. Whether it is an admission against interest or not is for me to decide.

Mr. Neave: That is right.

The Clerk: Defendant's Exhibit Y.

(The document referred to was marked as Defendant's Exhibit Y, and was received in evidence.)

[Note: Defendant's Exhibit Y will be found in the Book of Exhibits at page 1509.]

Mr. Lewis Lyon: Mr. Ruppright.

SIEGFRIED RUPPRIGHT,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Siegfried Ruppright; S-i-e-g-f-r-i-e-d, R-u-p-p-r-i-g-h-t.

The Clerk: And your address?

The Witness: 299 South Atlantic Boulevard.

The Clerk: That is in Los Angeles?

The Witness: Yes, sir. [167]

The Clerk: Take the stand.

Direct Examination

By Mr. Lewis Lyon:

Q. Mr. Ruppright, are you a member of the American Society of Refrigeration Engineers? A. I am.

Q. I hand you an article or a magazine entitled, "Refrigeration Engineering," issue of June, 1936, and refer you to the article starting on page 351 of that periodical entitled, "Defrosting." Are you familiar with that article? A. Yes, I am.

Q. Was that article presented before any meeting of the A.S.R.E. before it was published in that periodical?

A. Yes, it was.

Q. Where? A. At Skytop in 1936.

Q. Skytop, where?

A. Skytop, Pennsylvania, where the annual spring meeting of the American Society of Refrigerating Engineers was held.

(Testimony of Siegfried Ruppright)

Q. State whether or not that article was presented at that meeting orally.

A. It was presented in writing and it was briefed by me orally.

Q. What was the purpose of presenting it to the meeting before publication? [168]

Mr. Neave: I don't see the purpose of that.

The Witness: May I correct myself, not in writing, in printing. Everybody had a preprint of it in hand.

The purpose of the article—

The Court: Just a minute.

Mr. Neave: Just a minute.

That is a mental concept, as to what his purpose was.

The Court: I think so. Objection sustained.

Q. By Mr. Lewis Lyon: Changing the question, was it the practice of such an association to present these articles to the association meetings before publication?

A. Yes.

Q. Why? A. For discussion.

Q. Was this article so presented? A. Yes.

Q. Was it discussed? A. Yes.

Q. Was there any criticism made by any member of the A.S.R.E. present at that meeting to this article?

A. No, it was not criticized in a negative way.

Mr. Neave: Excuse me, Mr. Witness.

The Court: The question was, was there anything said, and the answer is no, so you can't object to it on the ground of hearsay because there wasn't anything said. [169]

Mr. Neave: Very well, your Honor.

The Court: What date was this meeting?

The Witness: It was in June, 1936. It lasted several days. I could not recall the exact date.

(Testimony of Siegfried Ruppright)

The Court: All right. June, 1936.

Q. By Mr. Lewis Lyon: Were you delegated by any executive officer of the Association of Refrigerating Engineers to prepare this article? A. Yes.

Q. Were you given any particular task by this executive officer in preparing this article? A. Yes.

Q. Who was the officer that instructed you to?

A. David L. Fiske, the secretary.

Q. What were you instructed to do?

A. To write a comprehensive article which would give a picture of the entire art of defrosting as known at the time.

Q. And in doing that did you make any investigation of any kind?

A. Yes. It involved considerable work.

Q. How long did that investigation take?

A. More than a month.

Q. Did this article give a comprehensive history of the art of defrosting as it existed at that time as shown by your survey of the art? [170] A. Yes.

Q. Do you know whether or not engineers from the York Corporation, plaintiff, were present at this particular meeting of the A.S.R.E.? A. Yes, quite many.

Q. Can you name any of them now?

A. Consulting Engineer Morse and the present Chief Engineer Bergdoll, I am very sure I remember they were there, but there were quite many because Skytop is very close to York, Pennsylvania, and it always has been a custom of the company to have quite many of the engineers present. I think there were at least ten men from York.

(Testimony of Siegfried Ruppright)

Q. How many engineers in total were present at this meeting, approximately, as far as you can remember?

A. About two hundred.

Q. And those people are all engineers of the refrigeration art so far as you knew, were they?

A. Oh, at least 90 per cent or so.

Mr. Lewis Lyon: Your Honor, instead of encumbering the record with the entire magazine, I have a photostatic copy of the article here.

The Court: Oh, put in the magazine.

Mr. Lewis Lyon: If you want the magazine put in, I will put in the entire magazine.

I will offer at this time in evidence as Defendant's [171] Exhibit Z the article entitled, "Defrosting," as it appears on pages 351, 352, 353, 354, 355 and as concluded on page 375 of the June, 1936, issue of the periodical, "Refrigeration Engineering," as written by this witness.

The Court: Admitted.

(The document referred to was marked as Defendant's Exhibit Z, and was received in evidence.)

[Note: Defendant's Exhibit Z will be found in the Book of Exhibits at page 1512.]

Q. By Mr. Lyon: Mr. Ruppright, are you familiar with the magazine or periodical, "The Ice Cream Review"?

A. Yes, I am.

Q. Is that a periodical of general publication in the refrigeration art?

A. To the extent that it applied to the ice cream industry.

(Testimony of Siegfried Ruppright)

Q. That is as applied to the ice cream industry, it is a periodical of the refrigeration art of regular publication?

A. It is a regular publication.

Q. And has been since prior to the issue which you have in your hand of September, 1934, is that right?

A. This has been published regularly since 1917.

Mr. Lewis Lyon: That is all.

The Court: Cross-examine.

Mr. Lewis Lyon: Pardon me just a minute.

Q. I hand you a further article, Mr. Ruppright, dated March, 1931, a photostat of pages 191 and 204 of "Refrigeration [172] Engineering" of that date, and will ask you if you are familiar with this article. A. I am.

The Clerk: That will be marked AA.

The Court: What is the name of this magazine?

Mr. Lewis Lyon: "Refrigeration Engineering" issue of March, 1931.

(The document referred to was marked as Defendant's Exhibit AA, for identification.)

Q. By Mr. Lewis Lyon: Are you the author of that article? A. I am.

Q. Did that article appear in "Refrigeration Engineering" written by you as of that date?

A. Yes, it did.

Mr. Lewis Lyon: I will offer the article herefore identified as Exhibit AA for identification as Defendant's Exhibit AA.

(The document referred to, heretofore marked as Defendant's Exhibit AA, was received in evidence.)

[Note: Defendant's Exhibit AA will be found in the Book of Exhibits at page 1517.]

(Testimony of Siegfried Ruppright)

Mr. Neave: I have no objection to its introduction, your Honor. I just want to call your Honor's attention, however, that if these articles are introduced in an attempt to prove that water defrosting was new, because there is no reference to water defrosting in the articles, the probative value of these articles is very small. I am not objecting to it because I want your Honor to have everything before you, but I am calling that to your attention.

The Court: They are admissible.

Mr. Neave: Yes.

The Court: What weight they are entitled to is a matter which we can determine later.

Mr. Neave: Yes.

Q. By Mr. Lewis Lyon: How long have you been engaged in refrigeration work, Mr. Ruppright?

A. Since 1920.

Q. In that capacity you have operated as a consulting engineer, have you?

A. As a consulting engineer since 1930.

Q. Prior to 1930 what was your connection with the refrigeration art?

A. I served as an engineer for four years with the Frigidaire Corporation, and before that I have handled refrigerating system as far as design, installation and operation is concerned in various parts of the globe for other companies.

Q. Are you a graduate engineer? A. Yes.

Q. Of what university?

A. Of the Engineering College of Hanover, Germany. [174]

(Testimony of Siegfried Ruppright)

Q. What year, Mr. Ruppright? A. 1920.

Mr. Lewis Lyon: That is all.

The Court: Cross-examine.

Cross Examination

By Mr. Neave:

Q. I think you said on your direct that you spent a month making an investigation in connection with this article which is Defendant's Exhibit Z. Did you not say that? A. Yes, at least a month.

Q. Where were you living at the time that you made this investigation? A. In New York City.

Q. Was your investigation limited to New York City?

A. No.

Q. Where else did you investigate?

A. In the adjacent towns, and I spoke to quite a number of other engineers about the art.

Q. I beg your pardon?

A. I discussed the matter with quite a number of other engineers to find out if I was missing something.

Q. What towns did you conduct your investigation in?

A. Jersey City, I think in York, Pennsylvania, but essentially it was literary work.

Q. Literary work? [175]

A. But I have had practical experience, too.

The Court: As I understand it, you graduated in 1920 in engineering.

The Witness: Yes.

The Court: You then went to work in refrigeration engineering?

The Witness: Not exclusively in the beginning, but I gradually worked into refrigeration exclusively.

(Testimony of Siegfried Ruppright)

The Court: Until 1930?

The Witness: In 1930 I became a consulting engineer

The Court: When did you begin to devote your time to refrigeration engineering exclusively?

The Witness: Exclusively in 1926.

The Court: And you continued in that until 1930?

The Witness: As an employee; yes.

The Court: As an employee?

The Witness: Yes.

The Court: Then in 1930 you were consulting engineer with relation to refrigeration engineering?

The Witness: Yes.

The Court: In that limited field?

The Witness: Yes.

The Court: And have continued in that up until the present date?

The Witness: Yes. [176]

The Court: All right.

Q. By Mr. Neave: Who did you work for in 1927 and 1930? A. Frigidaire Corporation.

Q. In your investigation did you have occasion to investigate the Carnegie Steel Company, the Isabella furnaces in Pittsburgh? A. No, but I know of them.

Q. Did you investigate at that time any uses in Indianapolis? A. No.

Q. Did you investigate at that time any uses in Chicago, at the Illinois Steel Company? A. No.

Q. Did you investigate at that time any uses at the Northwestern Iron Company at Mayville, Wisconsin?

A. I did not confine myself to special installations. I had to find out the complete state of the art.

(Testimony of Siegfried Ruppright)

Q. I am just asking you a question, and if you will just answer my questions we will get along much faster.

What about Yamhill, Oregon, did you investigate anything up there? A. No.

Q. Did you yourself ever operate, build or operate, a water defrosting system prior to 1937?

A. Yes. [177]

Q. Tell us about that.

A. I just used water for defrosting like many people do.

Q. When was that?

A. I think it was as early as 1927.

Q. What kind of a unit was it that you did that with? What was the construction?

A. Just a water hose.

The Court: Was it a commercial unit?

The Witness: It was a commercial unit; yes.

By Mr. Neave: You just took a water hose and sprayed water on it? A. Yes.

Q. And it took the ice off? A. Yes.

Q. Did you ever, prior to the writing of your article, manufacture or use a water defrosting system where there was a spray head over the coils? A. I did not.

Mr. Neave: That is all.

The Court: Redirect?

Mr. Lewis Lyon: Yes, your Honor.

Redirect Examination

By Mr. Lewis Lyon:

Q. In this hose system, is it my understanding that you took a hose and sprayed water on a pipe coil, is that what you [178] did? A. On a fin coil.

Q. On a fin coil and a pipe coil? A. Yes.

(Testimony of Siegfried Ruppright)

Q. And in that operation it was necessary to remove the produce from the room before you could make such an operation, was it not? A. Yes.

Q. When you ended up you had ice on the floor, if the room happened to be below zero?

A. It wasn't a below zero room.

Q. It was an above zero room?

A. Nobody would have attempted that at that time unless he started to invent something.

Mr. Neave: I object to that. It wasn't responsive to the question. It is pure opinion.

The Court: He is an expert.

Mr. Neave: Well, I don't know, your Honor. He hasn't shown any expertness in defrosting. He said he never even tried it.

Mr. Lewis Lyon: He said he did try it.

The Court: The motion is denied. You can cross-examine him.

Mr. Lewis Lyon: That is all.

Mr. Neave: That is all. [179]

Mr. Lewis Lyon: May this witness be excused?

The Court: Yes, this witness may be excused.

(Witness excused.)

The Court: We will have a short recess at this time.

(Short recess.) [180]

Mr. Lewis Lyon: Do you desire to interrogate Mr. Ruppright, your Honor?

The Court: Oh, yes.

Q. By the Court: I think in answer to the last question some objection was made, and a motion to strike, and I overruled the objection and denied the motion. You stated that nobody would have attempted to use water with

(Testimony of Siegfried Ruppright)

rubber hose to defrost in sub-zero. You express that as an opinion of yours? A. Based on my experience.

Q. Based on your experience?

A. With other people.

Q. What is the basis of that conclusion?

A. The water freezes in the rubber hose, and it will freeze—it is expected to freeze everywhere it gets in that sub-zero room.

Q. It would freeze on the floor?

A. It would freeze on the floor.

Q. Freeze on the pipes?

A. Or on the pipes, or in the pipes.

Q. In other words, it would not defrost?

A. It would not defrost except in a few spots and then refreeze.

Q. All right. Now, at what temperature would that occur? Take freezing, 32, how far below freezing could you use a [181] rubber hose and ordinary tap water to defrost? At what temperature is the lowest that that could be done? A. About 25, 26.

Q. And below that you would have an icing condition?

A. Oh, yes.

The Court: That is all I have. Do you wish further cross examination?

Mr. Neave: Yes, your Honor.

The Court: Or do you have further direct?

Mr. Lewis Lyon: No, your Honor.

Recross Examination

By Mr. Neave:

Q. Did I understand you to say, Mr. Ruppright, that the water would freeze in the pipes? A. Yes.

(Testimony of Siegfried Ruppright)

Q. At below 32?

A. If it is sufficiently below 32 I have seen that happen.

Q. All water freezes below 32?

A. No. I mean in pipes and in hose.

Q. If it is left there?

A. Even while it is running.

Mr. Neave: I see. That is all.

The Court: That is all. You may be excused.

Mr. Lewis Lyon: Mr. Tally. [182]

CAREY K. TALLY,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name?

The Witness: C. K. Tally, T-a-l-l-y.

The Clerk: And your address?

The Witness: 2905 East 11th Street, Los Angeles.

The Court: What was the name?

The Witness: Tally, T-a-l-l-y.

The Court: Your whole name, your first name?

The Witness: Carey, C-a-r-e-y.

The Court: Very well. You may be seated, Mr. Tally.
By Mr. Lewis Lyon:

Q. What is your occupation, Mr. Tally?

A. I am manager of the Creamery Package Manufacturing Company, the Los Angeles branch.

Q. How long have you been connected with the refrigeration industry? A. Since 1928.

(Testimony of Carey K. Tally)

Q. What is your training in refrigeration engineering?

A. Just training as salesman. My experience is primarily dairy manufacturing and processing.

Q. Have you at any time become familiar with the water defrost as put out by Refrigeration Engineering? [183]

A. Yes. My first introduction to the water defrost coil, I believe, was about the last of '39, or somewhere along in there.

Q. Will you explain where you first became acquainted with water defrost?

A. At that time I was assistant manager in charge of sales of this branch, and our manager, Mr. A. J. Cowell—

Q. That is where? At your own place of business?

A. Yes.

The Court: What is that plant?

A. 2905 East 11th Street.

The Court: What is the name of it?

The Witness: The Creamery Package Manufacturing Company.

The Court: All right, counsel.

Q. By Mr. Lewis Lyon: Now, will you explain the circumstances of your first introduction to water defrost?

A. Mr. Cowell, our manager, called me into his office and told me that Mr. Jarvis—

Mr. Neave: Just a moment. I think we are getting into hearsay again.

The Court: Yes, hearsay. It may be stricken.

The Witness: My first introduction to the coil was when Mr. Jarvis came over to the office to tell us about this new coil.

The Court: Well, when was that? [184]

(Testimony of Carey K. Tally)

The Witness: I think it must have been the latter part of '39.

The Court: The latter part of '39?

The Witness: Yes.

Q. By Mr. Lewis Lyon: You say Mr. Cowell was manager of the plant at that time?

A. Yes.

Q. What was his full name?

A. Arthur J. Cowell.

Q. To your knowledge, how long had Mr. Cowell occupied that position at that time?

A. At that time he had been manager since the branch opened here in 1924.

Q. To your knowledge, how did Mr. Cowell receive the idea of water defrosting?

Mr. Neave: I object to that.

The Court: Sustained.

Mr. Lewis Lyon: You Honor, if I may be heard on that matter and in that respect, I would like to call your Honor's attention to Wigmore on Evidence, Volume 3.

The Court: Which edition?

Mr. Lewis Lyon: Section 1790.

The Court: Paragraph 1790?

Mr. Lewis Lyon: Paragraph 1790.

The Court: Section? [185]

Mr. Lewis Lyon: Or Section 1790.

The Court: How does that compare with this Third Edition, do you know?

Mr. Lewis Lyon: I do not know offhand.

The Court: What edition is that?

Mr. Lewis Lyon: This is the 1904 edition. It is a little antique. It is under the title of "Sundry Utterances."

(Testimony of Carey K. Tally)

Mr. Neave: That may be Paragraph 2441 of the Second Edition.

The Court: This is the Third Edition that I have.

Mr. Neave: Well, I only have a translation from the First to the Second Edition.

The Court: "Res Gestae, Verbal Acts. 1790. Utetances as indicating substantially the speaker's own mind."

Mr. Lewis Lyon: That is the paragraph, your Honor.

The Court: That is the paragraph?

Mr. Lewis Lyon: Yes, your Honor.

The Court: Go ahead.

Mr. Lewis Lyon: It sets forth that as far as the hearsay rule is concerned utterances indicating a person's state of mind are a distinct exception to the hearsay rule and are admissible as showing the state of mind, particularly in a condition of this kind.

The Court: That is, the condition of the speaker's mind, it says. Isn't that the witness' mind?

Mr. Lewis Lyon: The condition of the speaker's mind, [186] and another person can testify to that statement made at that time, showing the condition of the person's mind when he made that utterance.

Mr. Neave: I don't so read that, your Honor.

Mr. Lewis Lyon: There are specific examples given, your Honor.

The Court: Well, they point out that the evidence is circumstantial and not testimonial, and for that reason would not be obnoxious to the hearsay rule. I can't see any circumstantial evidence here.

Mr. Lewis Lyon: It is either one, your Honor.

The Court: What is that?

(Testimony of Carey K. Tally)

Mr. Lewis Lyon: It is either one.

Mr. Neave: It depends on what you are trying to prove. If you will look over towards the end of that paragraph it shows the conditions where this may be used; if you are trying to show insanity, or knowledge or belief where it is in point, relevant to the issue, but what we are saying here is that it is not relevant.

Mr. Lewis Lyon: It is clearly relevant to the issue, showing the state of the art and the belief of the engineers, as to their beliefs as to what could be or could not be done at that time, and that their belief on the subject was uniformly that it could be done.

Mr. Neave: That person should be produced when a third [187] person testifies to that.

The Court: I think that is correct.

Mr. Charles Lyon: If your Honor would look at it thus: The plaintiff is stating in its trial brief that the McAdam patent was so obvious it would occur to any one skilled in the art. We show here that men skilled in the art did not believe the obvious, but when they saw it did not believe it, their minds did not receive it. If a man makes such a statement—if the statement that the witness is now testifying to made by this third party indicates his state of mind, you don't have to believe the statement. It isn't hearsay. You are not relying on the truth of that statement. The mere fact that he made the statement is evidence of what his state of mind was at that time, and, therefore, in does not fall within the hearsay rule whatsoever. It is a verbal act. It indicates his state of mind, that it was non-receptive to this idea. Any other act would have the same probative value and would be the same thing. It is not hearsay for that reason, and is generally admissible.

(Testimony of Carey K. Tally)

Mr. Neave: I don't know how much argument your Honor wants on this point, but it seems to me that this gentleman should not be called upon to testify as to what somebody else in his company said. Now, if they want to prove what the state of mind of that fellow was, why not produce him, and then we can examine him. [188]

Mr. Lewis Lyon: I might clear that point with one question.

Q. By Mr. Lewis Lyon: Is Mr. Cowell alive?

A. No, sir.

Q. He is dead. How long has he been deceased?

A. He passed away two years ago the 30th of this month.

Mr. Neave: That shows the protection of the rule. Here is a fellow who is dead, and we couldn't call him ourselves to have him explain why he had that state of mind.

The Court: Yes, I imagine it would be rather difficult.

Mr. Lewis Lyon: To call him, yes.

The Court: The objection is sustained.

Mr. Lewis Lyon: I would like, your Honor, to make an offer of proof.

The Court: All right.

Mr. Lewis Lyon: I don't know in what form your Honor desires that that be made, either to have the witness testify or by my statement?

The Court: I think by your statement.

Mr. Lewis Lyon: I offer to prove by this witness the facts concerning the utterances of Mr. Cowell at the time this problem was shown to him, that his statement, made to this witness when he called him into his office, was that "Mr. Jarvis here has an idea, but I believe it to be entirely

(Testimony of Carey K. Tally)

crazy; but it may have possibilities and I would like to have [189] you listen to his story." That is clearly indicative of the state of the man's mind, as to his reception of the problem, and clearly refutes any argument that the solution which Mr. McAdam made to this problem in the art was obvious to any one.

The Court: The offer of proof is denied on the ground of hearsay.

Q. By Mr. Lewis Lyon: Mr. Tally, after Mr. Jarvis told you his story with respect to water defrost, did you do anything else—you or Mr. Cowell?

A. Yes. Since I had charge of sales, I was very favorably impressed with the coil, and I called a sales meeting, which I think took place the next week, at which time Mr. Jarvis presented the story of his coil to our sales organization.

Q. Following that demonstration by Mr. Jarvis, did you at any time make any sales of the Recold Water Defrost unit?

A. Yes, following that we sold our first installation to the Dutch Maid Ice Cream Company of Los Angeles.

Q. In conjunction with that sale, was it, or was it not necessary for Creamery Package to make a guarantee to the customer of satisfaction or to remove and replace that installation with some other type of equipment?

A. Yes.

Q. Did you make such a guarantee?

A. Yes. [190]

Q. Did you ever have to take out the unit and make any other installation?

A. No, sir.

Q. In that deal did you deal with Mr. Lawrence?

A. Yes, sir.

(Testimony of Carey K. Tally)

Q. Did Mr. Lawrence accept the guarantee of Creamery Package of America? A. Yes, sir.

Q. Without other investigation?

A. No, he did make some other investigation, but he wasn't still—he still wanted assurance, inasmuch as it was a new idea as far as he was concerned, and he wanted assurance that it would be—you know, that he would have protection.

Mr. Neave: I move that that last part of the answer be stricken, that it was a new idea so far as he was concerned. It doesn't seem to me that is anything that this witness can testify about.

The Court: It may be stricken.

Q. By Mr. Lewis Lyon: Did you take Mr. Lawrence to the office of Refrigeration Engineering, in conjunction with trying to make this sale to him?

A. Yes, we did.

Q. Who did you see at Refrigeration Engineering?

A. We saw Mr. Jarvis, and I believe Mr. Hancock. He wanted to see how the coils were made, so naturally we were [191] very happy to show him.

Q. Were the Recold Coils demonstrated to him at the Refrigeration Engineering plant at that time?

A. I believe they were, yes.

Q. Was an offer made at that time by Refrigeration Engineering to guarantee the installation?

A. Yes sir.

Q. Or to replace it with the same type of guarantee you offered to Mr. Lawrence? Is that correct?

A. Yes, sir.

(Testimony of Carey K. Tally)

Q. Did you take Mr. Lawrence to any other installations of water defrost in Los Angeles?

A. No, sir.

Q. Did you suggest to Mr. Lawrence any other installations that he might see?

A. Mr. Lawrence was interested in seeing an ice cream plant, and we knew of one at Fresno, the Velvet Ice Cream Company, and I didn't go up there with him, but suggested that he go and see that installation. We were familiar with it.

Q. Did you, acting for Creamery Package of America, make other sales of this Recold water defrost in about that period of time?

A. Following this we made quite a few installations that year, yes.

Q. And did you refer other prospective customers to [192] the Dutch Maid Ice Cream plant, to see the operation?

A. Yes, sir.

Q. Was it necessary for you to give guarantees to these other customers of satisfaction, or that you would withdraw, and replace the coils with other systems?

A. No, sir.

Q. After they saw the Dutch Maid Ice Cream plant in operation your difficulties in that regard were removed; is that correct?

A. That's right, yes, sir.

The Court: Have you been installing them continuously?

The Witness: Yes, sir.

(Testimony of Carey K. Tally)

Q. By Mr. Lewis Lyon: Did you give any such guarantee to other special equipment that Creamery Package sells?

A. Yes, sir.

Q. I mean, guarantee of replacement?

A. Not necessarily replacement. Our equipment is guaranteed, and I think generally manufacturers guarantee it a year against defective material. I believe that is customary.

Q. The guarantee that you gave to Dutch Maid was of special character and not like the guarantees you gave with other ordinary equipment; is that correct?

Mr. Neave: I think perhaps we should not have quite so much leading, your Honor please. [192]

The Court: Yes. The objection is overruled.

The Witness: Well, in view of the fact that our guarantee was different there; I mean, because we didn't know, ourselves. It looked good, and after our engineers had analyzed it we saw no reason why it should not work.

The Court: Your other guarantees were against defective equipment?

The Witness: Yes.

The Court: That guarantee was not only against defective equipment?

The Witness: It was a guarantee that if it did not do what we told them it would do we would take it out and put in the conventional type of coil.

Mr. Lewis Lyon: That is all. Cross-examine.

The Court: Cross-examine.

(Testimony of Carey K. Tally)

Cross Examination

By Mr. Neave:

Q. Has your experience in refrigeration been confined to Los Angeles? A. Yes, sir.

Mr. Neave: That is all.

The Court: Step down. This witness may be excused.
The next witness.

Mr. Lewis Lyon: Mr. Payne. [194]

JAMES R. PAYNE,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: James R. Payne, P-a-y-n-e.

The Clerk: Your address?

The Witness: 1652 Redwood Highway North, Santa Rosa.

By Mr. Lewis Lyon:

Q. What is your occupation, Mr. Payne?

A. Refrigeration engineer.

Q. Connected with what company?

A. Payne Corporation.

Q. Located where? A. Santa Rosa, California.

Q. What is your experience or training in refrigeration engineering?

A. I have been in the business since 1922. I have taken a course in international—I mean at Sebal Institute of Technology, along with my practical experience and training.

(Testimony of James R. Payne)

Q. Where is that Institute of Technology located?

A. In Philadelphia.

Q. Did you graduate from that course? A. Yes.

Q. After you concluded that course, were you employed [195] by any concern?

A. A number of them.

Q. In refrigeration? A. Yes, sir.

Q. Including whom?

A. The Gay Engineering Corporation, National Ice and Cold Storage, and Haslett Warehouse Company.

Q. When were you first employed by the Haslett Warehouse Company? A. In 1932.

Q. What was the business of the Haslett Warehouse Company at that time?

A. Commercial cold storage.

Q. Where? A. In Oakland, California.

Q. What were your duties when you were first employed by that company? A. Chief engineer.

Q. In conjunction with that company's business, did they have a refrigeration system for maintaining their rooms below freezing? A. Yes.

Q. What type of equipment were they using?

A. Pipe coils.

Q. Did they have any method of defrosting? [196]

A. They had one room equipped with a defrosting system when I took over that had not been used for evidently a number of years.

Q. What type of system was that?

A. It was a brine spray system.

(Testimony of James R. Payne)

Q. At what temperatures was that room maintained at that time?

A. It was supposed to be maintained at zero, and at the time I took the plant over it was 15 above.

Q. It was in operation when you took the plant over?

A. It was in operation, yes.

Q. Why was the temperature, if you know, 15 degrees above zero when it was intended to be maintained at zero?

A. The ice accumulation was so great on the pipe that they could not get the temperature any lower than that.

Q. Did you do anything or try to do anything to rectify that situation?

A. I tried to use their defrosting system that was installed there.

Q. That is the brine system you referred to?

A. Yes.

Q. What did you do in that regard?

A. I mixed up batches of brine. What I mean by batches, they had a reservoir that they used for calcium brine, mixed calcium brine in, then used a pump by means of circulating this [197] brine through a series of spray nozzles over the pipe, and running into a pan below the pipe, then back into the reservoir again.

Q. How long did it take you to defrost, or how long did you endeavor to use that system to defrost that coil?

A. Just once.

Q. Did you effect a defrosting? A. Effect a—

Q. Did you complete the defrosting of the coil?

A. I completed that course of defrosting.

Q. How much brine did you use, or how much—

A. In gallons I could not say.

(Testimony of James R. Payne)

Q. How much calcium chloride did you use?

A. In pounds, I don't know, except that the management told me that I had spent \$150.00 on calcium chloride brine for that defrosting job when I had the defrosting completed.

The Court: How long did it take?

The Witness: Three days and nights.

The Court: You had it shut off?

The Witness: Yes, sir.

The Court: The freezing unit?

The Witness: Yes, sir.

The Court: Did you move the butter out of the room?

The Witness: Yes, sir, I had to. The temperature was going too high. I couldn't leave it in there. [198]

The Court: What was the temperature of the room when you finally completed the defrosting?

The Witness: Before I started my equipment, and refrigeration equipment, you mean to say?

The Court: Yes.

The Witness: It was about 30 above zero.

Q. By Mr. Lewis Lyon: When you started the equipment what did the equipment take the temperature down to?

A. Down to 5 below zero.

Q. During your experience with defrosting, did you run into any difficulty in icing with the use of that brine?

A. Well, that is why I had to use so much brine, because it would become diluted and cause an icy slush in my pan, catch-pan, below the coil assembly, and that would have to be raked out to prevent plugging my pipe back to my pump for recirculation.

(Testimony of James R. Payne)

Q. It is my understanding, then, to effect a complete defrosting that you spent \$150.00 in buying calcium chloride; is that correct? A. That's right.

Q. And all that calcium chloride was used in that one defrosting operation? A. Yes, sir.

Q. Are you familiar with the system of water defrost?

A. I am now, sir. [199]

The Court: You mean Recold?

Q. By Mr. Lewis Lyon: Of Recold, the Recold system of Refrigeration Engineering. A. I am.

Q. When did you first become acquainted with that system?

A. About the middle of 1940; I would say between April and July of 1940.

Q. Will you explain fully the circumstances of your becoming acquainted with or your introduction to water defrosting?

A. I was approached by Mr. Jarvis and Mr. Brown at the time I was installing a new freezer room for government butter storage and government turkeys.

Q. That is Mr. H. T. Jarvis here that you refer to?

A. Yes, sir.

Q. And Mr. Wyatt Brown? A. Yes, sir.

Q. Also here? A. Yes, sir.

Q. How far was the job along of construction of this new refrigerating storage room at the time Mr. Jarvis and Mr. Brown contacted you?

A. The insulation of the room was just about at completion. The machinery had been ordered, as well as the pipe. [200]

Q. What kind of pipe?

A. Two-inch black wrought-iron pipe.

(Testimony of James R. Payne)

Q. For what kind of a refrigeration system?

A. Just an overhead coil.

Q. That is a continuous overhead coil system that was hung from the roof, made out of open pipe; is that correct?

A. That is right.

Q. Was such a system installed in that warehouse?

A. Yes, we had three other systems of the same nature.

Q. In this new room, was that system installed?

A. No, that system was not installed.

Q. Do you recall the date when you were first told by Mr. Jarvis and Mr. Brown about this Recold water defrost system?

A. I don't recall the date. I would say it was March or April possibly May. It was within those three months.

Q. Had you ever heard of any such system before that?

A. No, I had not.

Q. After you were informed of that system, did you make any investigation to find out whether or not it would work?

A. Yes, I visited two; one ice cream hardening room and one bakery.

Q. Where were those located?

A. San Francisco.

Q. How large was this particular room that was under [201] construction at that time?

A. 103 feet long, about 31 feet wide, with a 10 foot ceiling.

Q. Were Recold coils subsequently installed in that room?

A. Yes.

Q. How many of them?

A. Thirteen.

(Testimony of James R. Payne)

Q. Of what size, do you know?

A. I believe they are called their No. 2500-LT. In tons of refrigeration that is approximately one and one-quarter tons as the rating—their catalogue rating gives it.

The Court: You mean to refrigerate one and one-quarter tons—

The Witness: Per unit.

The Court: —of commodities?

The Witness: Yes, sir.

The Court: How long would the temperature of that room have to be kept?

The Witness: The government required 20-minus for butter and plasma and it was pulled as low—the temperature was lowered on the test run to 40 below for approval.

The Court: 40 below?

The Witness: Yes, sir. [202]

The Court: And the requirement for its use was 20?

The Witness: Yes, sir.

The Court: At least 20?

The Witness: That's right.

Q. By Mr. Lewis Lyon: To your knowledge, is that system still in operation? A. It is, sir.

Q. It is a successful operation — A. Yes, sir.

Q. —in using the system of water defrost?

A. Yes, sir.

Q. How often is that system defrosted, to your knowledge?

A. It depends on the load of merchandise.

Q. At each time, to your personal knowledge, that the defrost has been undertaken in that system, it has been successful or is that statement incorrect?

A. It has been very successful.

(Testimony of James R. Payne)

The Court: Have you had to move the commodities out of the warehouse to defrost?

The Witness: At no time.

Q. By Mr. Lewis Lyon: Has there been such a temperature rise inside the refrigeration chamber itself at any time to make it advisable to change the position of the merchandise in the chamber?

A. There has been no difference, no change of temperature, [203] or difference in merchandise, or no change of temperature in the room, because one coil can be defrosted at a time or all at one time. So in order to avoid any slight temperature difference, I am speaking now of the period during the war which was very critical for blood plasma and government butter storage, and it was requested that a very steady and definite temperature be maintained, and for that reason we defrosted one coil at a time, to avoid any possible change of temperature.

Q. You say that blood plasma was stored in this warehouse? A. Yes.

Q. For how long a period?

A. It extended over the duration or over the period of the war, but as far the length of time that each shipment would stay, it is hard to say, because one time it would come in and stay one day, and again it would stay two or three months. But it would come in by the ton, and they would work out of this quantity from there to the laboratories, as well as overseas shipments.

Q. And the room performed successfully its functions in meeting the cold temperatures of that blood plasma at all times?

A. Very successfully. We got very good reports from the government.

(Testimony of James R. Payne)

Q. While the plasma was in there, the room had to be [204] defrosted; is that correct?

A. That is correct.

Q. And it was defrosted using this system of water defrost? A. That is correct.

Q. Are you a member of the American Society of Refrigeration Engineers? A. I am.

Q. Are you also a member of the N. A.—

A. N. A. P. R. E., National Association of Practical Refrigerating Engineers?

Q. Yes. A. I am.

Q. How long have you been a member of those associations?

A. The N. A. P. R. E. since 1925, and the A. S. R. E. since 1942, I believe.

Q. What distinction is there between those two associations, if there is one?

A. N. A. P. R. E. is an association for practical purposes, such as operating engineers, to better the understanding of equipment, machinery, and so forth. The A. S. R. E. is for scientific studies.

Q. That is the distinction you would make, that one is an organization of practical engineers—

A. One is practical, and the other scientific. [205]

Q. —and the other is an organization of scientific engineers? A. That's right.

Q. I hand you, Mr. Payne, Defendant's Exhibit C, for identification, and ask you if you are familiar with that article. A. Yes, sir, I am.

Q. I notice in the body of that article a letter on the letterhead of the Haslett Warehouse Company, apparently

(Testimony of James R. Payne)

signed "James R. Payne." Do you know anything about that letter?

A. I wrote that letter, sir.

Q. Was that article taken up with you and discussed before it was printed or released?

A. No. Mr. Jarvis asked me to express my satisfaction with the operation of that job, and also asked me if it would be permissible with me to have it printed in an engineers' magazine, and I said—I gave him my consent.

Q. That is, the article was submitted to you before it was printed; is that correct?

A. No, not the article.

Q. Oh, you mean the letter?

A. The letter.

Q. I see. Have you read completely the article, as is appears, in Exhibit C?

A. You mean the letter, or the entire page? [206]

Q. The entire article.

A. I read it some time ago; shortly after it was printed.

Q. Does that article express the true condition of the operation and construction and the size of the Haslett Warehouse job, to which you have testified?

A. As far as I know, there are no mistakes.

The Court: Are you engaged in the business of installing refrigeration equipment now?

(Testimony of James R. Payne)

The Witness: Yes, sir.

The Court: Have you installed other of these Recold units?

The Witness: I have two jobs going in now. A 50-minus room for Swift & Company in San Francisco, using the water defrost—

The Court: That is Recold?

The Witness: —Recold, and for the Honor Brand Frozen Food Company I also have a large room, twice the size of this one that is in question at the moment.

The Court: The 130-foot room?

The Witness: It is 136 feet, by 47, by 12 feet high.

Q. By Mr. Lewis Lyon: That is also using Recold coils? A. Also with Recold Water Defrost.

Mr. Lewis Lyon: I would like to introduce the article, Exhibit C for identification, as Defendant's Exhibit C.

Mr. Neave: I object to the article, your Honor, unless the introduction of the article be limited to the letter and [207] to the statements of the size, the footage, and so forth, of the room in question. The article contains a number of other statements that are statements of this H. G. Kirkwood, which are completely hearsay statements. If the offer is limited to those things that the witness identified, I have no objection.

Mr. Lewis Lyon: If there are any statements that can be pointed out in this article that the witness has not

(Testimony of James R. Payne)

verified and which are statements of Mr. Kirkwood, as distinguished from facts this witness has verified, I have no objection to their being excluded.

The Court: He said he read the article at that time and they correctly stated the condition of the art at that time.

Mr. Neave: I think all he stated was that it correctly represented the conditions of his plant. Now, the last two paragraphs—

Mr. Lewis Lyon: That is not true.

The Court: No, I think he stated that the article correctly reflected his opinion of the condition of the art. Is that correct?

The Witness: Yes.

Mr. Neave: I didn't so understand.

The Court: It is admitted.

Mr. Neave: I object to the last two paragraphs of the article as purely hearsay statements of this writer of the [208] article.

The Court: The objection is overruled.

(The document referred to was marked as Defendant's Exhibit C, and was received in evidence.)

The Court: We will recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock P. M. of the same day.) [209]

Los Angeles, California; September 18, 1946, 2:00 o'clock P. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor.

The Court: Proceed.

Mr. Lewis Lyon: Mr. Payne.

JAMES R. PAYNE

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Lewis Lyon:

Q. Mr. Payne, what was the capacity of this Haslett Warehouse job, say taking butter as a stored product?

A. In pounds or cubic foot displacement?

Q. In pounds.

A. In pounds it was something over a million pounds. I think it was about a million and a quarter pounds total.

Q. Have you ever estimated the increase in cubic capacity of the room using the Recold water defrost system as compared with the pipe system that you were going to install?

A. Yes. I figured that out and made the comparison. However I don't remember the exact figures. I do remember that using butter as an example it would take about five years to pay the installation between the saving of the two.

Q. That is, in the saving of space it was enough to [210] pay for the entire refrigeration system in five years' time, is that correct?

A. That is true.

(Testimony of James R. Payne)

The Court: How many cubic feet is a million pounds of butter?

The Witness: About 30,000, if I remember right.

By Mr. Lewis Lyon:

Q: Before you installed these Recold—

The Court: Just a moment.

The Witness: Pardon me.

The Court: Did you say the saving in space would pay for the entire installation in five years, or did I understand you to say from your previous answer, or mean from your previous answer, that the difference in cost between the two installations would be that?

The Witness: No, sir. The difference in space saving.

The Court: Would in five years pay the entire cost of the installation of the Recold?

The Witness: Of the equipment; yes.

Your Honor, may I make a correction?

The Court: Yes, surely.

The Witness: I said 30,000; I meant 300,000. [211]

Q. By Mr. Lewis Lyon: Before you installed this Recold system in the Haslett job, was any special guarantee given or extracted from your supplier?

A. Yes, sir.

Q. What was that guarantee?

A. It was a six months guarantee.

Q. Was it of any specific character as to changing types of structure or reinstallation of another type in event of failure?

A. I would have to— I don't remember the guarantee word for word. However, I do know that the guarantee covered removing the Recold coils, and how far it went

(Testimony of James R. Payne)

towards replacing them with a pipe coil system that we had originally planned on using, I don't know. I would have to read that over to be sure.

The Court: Can you tell me this: In the two systems do you use the same compressor equipment?

The Witness: Yes, sir.

The Court: And do you use the same volume of freezing refrigerant?

The Witness: Yes, sir.

The Court: For the two systems?

The Witness: Yes, sir. Well, chances are you would use more ammonia in the pipe system than you would in the Recold blower coil because of the increased pipe size. [212]

The Court: Pardon me. Another question: In the Recold system for that warehouse—

The Witness: Yes, sir.

The Court:—did you use the same number of lineal feet of pipe?

The Witness: No, sir.

The Court: Would you use more or less?

The Witness: Let's have the question again, please?

The Court: In the Recold sysetem was the same number of lineal feet used for conveying the refrigerant as in the so-called pipe system system, or do you know?

The Witness: Yes, sir, I do know approximately; not exactly. The same amount of pipe, lineal feet of pipe from the room to the compressors. That was the same, but for the coils far less pipe, lineal feet of pipe; that is, with the blowers far less lineal feet of pipe than the overhead pipe coils.

(Testimony of James R. Payne)

The Court: That is, the Recold system for each unit had four lineal feet less?

The Witness: Not four less. It had many feet less.

The Court: Oh, many feet less?

The Witness: Yes. I don't know the exact comparison.

Q. By Mr. Lewis Lyon: The total lineal feet of the type containing the refrigerant in the 13 units that were installed, how did that compare with the total number of lineal feet of [213] the overhead pipe?

A. I wouldn't know that.

Q. Was it less or more?

A. It was far less.

Q. It was far less, did you say?

A. Yes.

Q. You have explained to me the operation of this room during war-time conditions. Is it true or not that, using the pipe coil system, you could have maintained the capacity in the operation of this Haslett warehouse the same in using the overhead pipe system and using the Recold blower system during your war-time operations?

A. Could I have stored as much products?

Q. Yes. A. No, I could not.

Q. Will you explain just what the operations were in war-time as to the amount of merchandise moved in and out of that room?

A. Speaking in pounds, we handle from 30 to 45 thousand pounds daily through this room.

Q. That is, there were thirty-five to forty thousand pounds coming in and equally thirty-five to forty thousand going out? A. That's right.

(Testimony of James R. Payne)

Q. What kind of a load—I mean, what kind of a [214] defrosting problem did that present?

A. It presented no defrosting problem with the Recold blowers that we had in there. [215]

Q. Well, if you had been using coils, what kind of a defrosting—I mean, overhead pipes, what kind of a defrosting problem would that kind of a load present?

Mr. Neave: I don't see that he would know, your Honor. He hasn't had any experience with that.

The Witness: Yes, I have.

Mr. Neave: I beg your pardon. Just tell us about it then.

The Witness: I think I made the statement before that we had three other rooms with overhead coils of the same type that this room had been planned, and our defrosting problem there was almost continuous. What I mean by that, we had a crew going continuous—that was not daily but day and night; we had day and night crews—going continuously defrosting and by either moving the merchandise or spreading tarpaulins over the merchandise and scraping the ice off.

By Mr. Lewis Lyon:

Q. That is, in these other three bare pipe rooms?

A. Yes. That would have applied to this room if we had used over head pipes. Therefore we wouldn't have been able to handle the volume of merchandise.

The Court: You used the method of scraping the ice off?

The Witness: Yes, sir, and unless we emptied the room out and then we could circulate hot gas and let it all fall at one time, but we had to get in there with scoop

(Testimony of James R. Payne)

shovels [216] and scoop it out before it had a chance to freeze to the floor.

The Court: When you scraped the ice off the coils, did you cut off the refrigerating machinery then?

The Witness: No, sir, we did not.

The Court: You mean you worked in those rooms at 20 below zero?

The Witness: These rooms didn't run 20 below; they ran about 5 below.

The Court: So you left your refrigerant on?

The Witness: Yes, sir.

By Mr. Lewis Lyon:

Q. The only room that you operated during the war at 20 degrees below was the one containing the Recold units in it, is that correct?

A. That is correct.

Mr. Lewis Lyon: That is all.

The Court: Cross examine.

Cross Examination

By Mr. Neave:

Q. I think you stated that this room was 103 by 30 by 10, is that right?

A. 31, something like that. I don't remember the exact figures. That was only approximately.

Q. Doesn't that make 30,000 rather than 300,000 cubic feet? [217]

A. I was right in the first place. Thanks for the correction.

Q. Now this increased capacity due to the Recold unit that you are talking about, that was due to the fact, wasn't

(Testimony of James R. Payne)

it, that you had coils concentrated in a unit with fins on the coils and a blower?

A. May I have the question again?

The Court: Read the question.

(The question referred to was read by the reporter, as follows:

("Q. Now this increased capacity due to the Recold unit tht you are talking about, that was due to the fact, wasn't it, that you had coils concentrated in a unit with fins on the coils and a blower,")

The Witness: That is correct.

By Mr. Neave:

Q. That is, you had a package unit which did not take up very much space? A. That is true.

Q. As compared with pipes on the sides of the room?

A. On the side or ceiling; yes.

Q. Were those pipes that you had in the other rooms, or that you were going to place in this room, on the side as well as the ceiling?

A. No, they were on the ceiling. [218]

Q. Only on the ceiling? A. Yes, sir.

Q. How did that interfere with the capacity of your room?

A. It lowers your ceiling height.

Q. How deep is that?

A. About two and a half feet.

Q. So that you could not pack it up to the top of the ceiling? A. No, sir.

The Court: May I interrupt you?

Mr. Neave: Yes.

(Testimony of James R. Payne)

The Court: I understood you to say that the increased capacity was due to this package unit. Could you have had the package unit, that is, with the fins and the blower, if you had not had the Recold defrosting?

The Witness: No, sir.

The Court: You have seen that in operation or attempted operation?

The Witness: The Recold blower?

The Court: No, not the Recold, I mean the fins and coils instead of pipes.

The Witness: Well, I had never seen them in a low temperature room in operation; no, sir.

The Court: All right. [219]

By Mr. Neave:

Q. At the time that you bought these units did you inquire from any other manufacturer as to such units for this purpose? A. No, sir.

Q. So that you don't know whether or not at that time there were unit packages with fin coils and blowers?

A. Yes, for high temperatures.

Q. Do you know whether there were for low temperatures?

A. Only from literature that had been mailed to me from this engineering association which I am a member of, and that had been proven at one of our meetings by Mr. Jarvis. I wasn't there at the meeting, I was in the hospital.

Q. But you didn't know of any other manufacturer other than Refrigeration Engineering?

A. No, I didn't

(Testimony of James R. Payne)

Q. It didn't come to your attention?

A. No.

Q. You spoke of a room that you defrosted with brine. Now as I understand it, those were pipes, were they not, that were defrosted?

A. Yes, sir.

Q. Were those pipes on the ceiling?

A. No, sir, they were built in a bank.

Q. On the side of the room? [220]

A. They were built within a room, a bunker as we call it. Instead of being enoused by metal they were enoused by lumber.

Q. Was there any way that a forced draft circulation was had, a fan or something of that sort?

A. There was a fan mounted in a tunnel, not within this bunker space but off to one side, creating a forced circulation through the bunker.

Q. That is what caused the cold air to get into the refrigerated space from the bunker?

A. That is right.

Q. What was the size of those pipes?

A. Two inches.

Q. And how many feet were they?

A. I wouldn't attempt to guess.

Q. How long was the bunker?

A. Approximately 22 feet.

Q. And how high was it?

A. Approximately 8 feet.

Q. And how deep was it? How many rows of pipes did it have?

A. I don't remember.

Q. You don't remember?

A. No, sir.

Q. Was it more than one row? [221]

A. Oh, yes, there was a number of rows.

(Testimony of James R. Payne)

Q. Ten?

A. I wouldn't say whether it was 10 or 15. Chances are it would run in the neighborhood of 10. It may have been as many as 20.

Q. How far apart were these pipes from each other, do you know?

A. Approximately six inches.

Q. In each direction, up and down and sideways?

A. Approximately.

Q. Now you spoke of there being a tank I believe in which a brine solution was kept?

A. Mixed.

Q. It was from that tank that the brine solution was sprayed on the coils?

A. Yes, sir.

Q. How big was that tank?

A. It held 500 gallons.

Q. Was there a spray header that went over the top of the coils?

A. Yes, sir.

Q. What was that spray header?

A. It was, I believe, 2-inch pipe with spray nozzles on about 12-inch centers.

Q. How many of those pipes were there? [222]

A. One over each bank, each series of coils.

Q. How many would that make?

A. Whatever number of banks of coils we had in there, whether it was 10 or 20.

Q. I suppose that when you started defrosting the condition of the coils was that they were all covered with ice?

A. Yes. [223]

Q. And there was very little space between the coils?

A. That's right.

(Testimony of James R. Payne)

Q. How long had it been since those coils had previously been defrosted?

A. From what I had been told by engineers working there at the time that I took the plant over, they had never been able to get a complete or total defrosted job. That is why I was asked to spend the money that was necessary to get a complete, total defrosted job and try to lower this temperature.

Q. How long has that installation been in operation?

A. I believe it was put in in 1927.

Q. And the period you are talking about was—

A. 1932.

Q. 1932. Is that your only experience with brine defrosting? A. I believe it is.

Q. Do you know what the price of the brine was,—of your calcium chloride was per hundredweight?

A. About three cents a pound, if I remember right.

Q. Now, in your defrosting at present, do you use tap water? A. Yes, sir.

Q. City water, is it? A. Yes, sir.

Q. What is the temperature of that water, do you know? [224]

A. That water runs about 70 degrees.

Q. How long does it take you to defrost?

A. I don't think it exceeds seven minutes to the unit.

Q. I suppose it defrosts first at the top, the top coils are the first defrosted, underneath the spray?

A. Well, I imagine it works that way inside the housing. However, the frost starts disappearing at the bottom of the coil just about as quick as it does at the top, looking at the face of the unit.

(Testimony of James R. Payne)

Q. Have you ever looked into the housing while it was being defrosted?

A. I couldn't very well without getting wet. I haven't taken the housing apart to watch that.

Q. What is the temperature of the coil after it has been defrosted and before you put the unit into operation?

A. Well, I have defrosted those units in operation.

Q. Well, suppose that it is not in operation.

A. If it is not in operation, I imagine it would be about the same temperature as the water, or near that; the chances are 10 degrees difference.

Q. Have you ever taken those temperatures when you actually left the refrigerant in the coils?

A. That would be a difficult thing to do.

Q. You haven't done it?

A. No, sir. [225]

The Court: Have you taken the temperature of the air in the room?

The Witness: That doesn't change, your Honor.

The Court: It doesn't change?

The Witness: No, sir.

Q. By Mr. Neave: That is because the operation is going on inside of this unit?

A. No, sir. That is because I had to defrost only one unit at a time, and I had twelve other units operating at this same time to avoid any change in temperature.

Q. I see. You haven't defrosted all twelve together at the same time?

A. Oh, I have. I have defrosted them all together, but not during the period that the government had this merchandise in there, and we were working under very strict orders.

(Testimony of James R. Payne)

Q. You didn't want to take that chance?

A. It wasn't advisable.

The Court: What happened when you did defrost them all at once? Did the temperature in the room materially change?

The Witness: It made a difference, a temperature difference about 10 feet away from the coils.

The Court: Up to about 10 feet?

The Witness: Yes, sir.

The Court: Within 10 feet?

The Witness: Within 10 feet of the coil, or about 10 feet [226] from the coil, there is a noticeable temperature difference along the ceiling. But at 20 to 30 feet from the coils I have checked very closely with thermometers, with the merchandise stored within, and I have recorded no temperature change, and in less than five minutes after the units are put back in operation your temperature seems to equalize, and it picks up what small amount of heat there is floating near the ceiling, just about in that length of time, so your room or the food stored within the room doesn't have time to change in temperature.

The Court: So that if you defrost the entire bank of 13, you do that in seven or eight minutes?

The Witness: Yes, sir.

The Court: And in that seven minutes time there is a temperature change as far out as 20 feet, you say?

The Witness: Ten feet, sir.

The Court: Out as far as 10 feet?

The Witness: That is the most I have noticed.

The Court: And the temperature of the merchandise remains constant?

(Testimony of James R. Payne)

The Witness: That's right.

The Court: And after seven or eight minutes, within five minutes the whole room comes back—

The Witness: Comes back to normal.

The Court: To normal? [227]

The Witness: To the normal temperature you were operating under at the time you shut down for defrosting.

Q. By Mr. Neave: What is the normal temperature that you were operating under?

A. We were operating under from 10 to 20-minus. There was times that we had instructions to operate at 20-minus, and that would continue until we had further notice that we were allowed to raise the temperature or allow the temperature to rise, or it had to be lowered, depending upon the commodities the government had in storage.

Q. I suppose when you have a room that is full of commodities that are at that temperature, they have a pretty good refrigerating effect of their own, don't they?

A. That is true.

Q. Do you know what the pressures are that are developed inside of the coil with water defrosting?

The Court: With the Recold system?

Mr. Neave: With the water defrosting, the Recold system.

The Witness: A. That would depend largely on the pressure that you started out with. In other words, if you

(Testimony of James R. Payne)

started out with 10 pounds of pressure in the coil and the ammonia was confined in there to where your pressure couldn't escape, why, you would build up to approximately 60 or 70 pounds, I would say.

Q. By Mr. Neave: Doesn't it have a good deal to do with [228] what the temperature of the coil is?

A. Well, the temperature of the coil runs true to form with the temperature of the room.

Q. I don't suppose that is true, though, after you have defrosted? A. Oh, no.

Q. Now, have you any knowledge of what the pressures are in the coils after you have defrosted, before you put the unit in operation? What I want to know is whether you know.

A. That I wouldn't have any way of determining without putting a gauge on, and in the system that I used for defrosting, my pressure would be the same as it would when I was in normal operation, because I never shut the suction line of the unit off. All I did is stop the fans.

Q. Would it be the same, irrespective of what the temperature of the coil was? A. Yes, sir.

Q. Whether the coil was 32 degrees or whether it was 70 degrees?

A. The coil could be 300 degrees.

Q. And the pressure would be the same?

A. The pressure would be the same.

Q. In the coil? A. Yes, sir.

(Testimony of James R. Payne)

Q. I see. [229]

A. Now, I hope there is no misunderstanding here, because the system that I used, 12 coils was in operation while one coil was being defrosted, and the suction line or escape line was always left open. Therefore, your pressure had to be the same.

The Court: They all operated off of one?

The Witness: They all operated off of one header arrangement.

The Court: I see.

Q. By Mr. Neave: Well, suppose in those instances where you had them all off at the same time and you were defrosting them all at the same time, what would be the pressure inside of the coil then?

A. My pressure has registered in the engine room at times when I defrost them all at one time as high as 25 pounds. That is the most that I have ever seen it go, and that was unusual.

Q. Now, have you ever measured the pressures inside of coils which are defrosted by hot gas?

A. Only in the same manner as I have measured the pressure of the Recold blower coils that we are just speaking of. That would be the engine room pressure gauge.

Q. Would that be when all of your units were closed down, that is, all the units that you had under hot gas operation?

A. Well, we are speaking of pipe coils now. [230]

(Testimony of James R. Payne)

Q. All right. Taking pipe coils.

A. You have to shut those down to defrost with hot gas.

Q. That is right.

A. And your pressure is much greater because you are using your discharge of heat pressure and recirculating it through a cold pipe. Therefore, your pressure could be as much as 50 or 60 pounds, because your discharge pressure which you are taking off of is 125 to 175.

Q. Yes. Now, would you consider that 50 or 60 pounds is a critical pressure? A. No.

Q. How often do you defrost your Recold units?

A. It depends on the volume of merchandise that is stored and the amount of moisture and heat that is taken in with this merchandise. There have been times in taking in steaming merchandise that they would have to be defrosted every day. There is other times I have seen them go for a month without being defrosted.

Mr. Neave: That is all.

The Court: Is that all? -

Mr. Neave: That is all, Mr. Payne.

Mr. Lewis Lyon: That is all.

The Court: The Witness may be excused?

Mr. Lewis Lyon: The witness may be excused.

(Witness excused.) [231]

Mr. Lewis Lyon: Call Mr: Karl Weber.

KARL WEBER

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name.

The Witness: Karl Weber; K-a-r-l, and one "b" in W-e-b-e-r.

The Clerk: And your address?

The Witness: 5700 Avalon Boulevard, Los Angeles.

The Clerk: Take the stand.

Direct Examination

By Mr. Lewis Lyon:

Q. What business are you engaged in, Mr. Weber?

A. Manufacturing store equipment and refrigerators.

Q. Is that what the Weber Showcase & Fixture Company does?

A. That is right.

Q. Are you an officer of that company?

A. Yes, sir, president.

Q. How long have you occupied that position?

A. Since 1933.

Q. What is the business of the Weber Showcase & Fixture Company?

A. What is the business?

Q. Yes. [232]

A. Manufacturing complete store equipment, fixtures and refrigerators; mostly refrigerators now.

Q. Before and during the second World War did you take any part in introducing to the armed services a refrigerator for sub-zero holding of foodstuffs using water defrost system?

A. Before the war, is that the question? Did we before the war?

(Testimony of Karl Weber)

Q. Before or during the war? A. Yes.

Q. Did you work in conjunction with any other corporation in introducing that system to the Government?

A. No.

Q. Did you work with any other individual?

A. Yes, I worked with "Hi" Jarvis of Recold.

Q. To what department or branch of the service did you try to introduce that system?

A. I talked generally to all the branches but mostly to the Marine Corps. The Marine Corps was the most active at that time.

Q. Were you subsequently able to obtain an order from the Marine Corps for such units?

A. We did.

Q. Do you recall approximately when?

A. Just a few days after the war started, I think along [233] December. In fact I know it was December. The final consummating order was December 23, 1941.

Q. I hand you, Mr. Weber, a print of a drawing—
The Clerk: Defendant's Exhibit BB.

(The document referred to was marked Defendant's Exhibit BB for identification.)

By Mr. Lewis Lyon:

Q. —marked Defendant's Exhibit BB for identification, and will ask you if you are familiar with that drawing? A. I am.

Q. And was that drawing used in any way in connection with your introduction of this system to the armed services?

A. No, that wasn't in the introduction, it was after we received the order this is what we put out.

(Testimony of Karl Weber)

Q. This is the sketch of what was put out?

A. Yes.

Q. Who manufactured the box that went to fill that order?

A. You mean this part, the coils?

Q. Who made the box? A. We did.

Q. Who made the coils and mechanical equipment?

A. Refrigeration Engineering.

Q. Do you remember, Mr. Weber, the circumstances of your obtaining that order? [234]

A. Very well.

Q. How.

A. I had been working before the war with the Marines and the Army and Navy who all had different ideas as to their refrigerator requirements, and told them that they should standardize on one and have one refrigerator for all the armed services. I got no where with that deal. They had, as I recall—I had made several trips to Washington and the Marines particularly had what I considered a very complicated refrigerating system. I am not a refrigerator engineer but I couldn't understand it because it was full of valves and heat elements and various things of that kind.

We had a man in Washington that I kept telling him—he was there to get business—I kept telling him that we wouldn't care to make the job at all that was because they were too complicated, as we considered ourselves part of the Army and we wanted to offer alternates, which they wouldn't listen to, and then came the war, Pearl Harbor, and a few days later they called me up and they had to have refrigerators, so I told them the only way they could get them from us in the time they needed them—in 20 days

(Testimony of Karl Weber)

in San Diego—was to waive all of their specifications and let us build the refrigerators the way we wanted to build them.

Q. And that was a water defrost refrigerator, including a Recold water defrost unit? [235]

A. That is right.

Q. You say you received this order. Do you recall the date of the reception of that order?

A. December 23, 1941.

Q. How long were you given to complete that order?

A. They told us they wanted them in San Diego crated by January 18th.

Q. Were you able to meet that schedule?

A. We did.

Q. With all 20 of them? A. That is right.

Q. I hand you a photograph marked Defendant's Exhibit M, and will ask you if you recognize that photograph. A. I do.

Q. What does that photograph show?

A. That is the unit we put on those 20 refrigerators.

Q. Including the Refrigeration Engineering Corporation's Recold water defrost?

A. That is right.

Q. Do you know how many similar, or approximately how many similar, refrigerating units were built for the armed services during the war?

A. I have made guesses. I would say in the neighborhood of 50,000 units.

(Testimony of Karl Weber)

Q. Did the Weber Showcase & Fixture Company continue to [236] make those units after this initial order?

A. Some few, not very many. We made some for the Navy after that, just for a small while. After that they bought them direct from the machine manufacturer.

Q. Did you continue to make boxes in any cases?

A. We did, all during the war.

Q. But you were not able to complete the installations in those cases because the units, the refrigeration units, were not purchased from you or from Refrigeration Engineering as far as you know?

A. That is right.

Q. Do you know whether or not, Mr. Weber, in all cases of those approximately 50,000 units that water defrost systems were specified by the Government?

A. I wouldn't know that they were specified. I know that all that I saw after that were water defrost.

Q. And you saw quite a number of them, did you?

A. Yes, I did.

Q. The Weber Showcase & Fixture Company has recently re-purchased some of those units, has it not?

A. That is right.

Q. From the War Surplus Administration?

A. That is right.

Q. And did those include the water defrost system?

A. Water defrost, same thing. They were Carrier units. [237]

Mr. Lewis Lyon: That is all.

The Court: Cross examine?

Mr Neave: No questions.

The Court: You may be excused.

(Witness excused.)

(Testimony of Karl Weber)

The Court: Next witness.

Did you offer BB in evidence?

Mr. Lewis Lyon: I will at this time, if I didn't, your Honor, make the offer of Exhibit BB for identification in evidence.

The Court: Admitted.

Did you have some objection?

Mr. Neave: No, your Honor. I assume it will be identified later as being Refrigeration Engineering Company's product, but I have no objection to it.

The Court: I guess he didn't testify as to the origin of it.

Mr. Lewis Lyon: Of what?

The Court: Of the drawing of Exhibit BB.

Mr. Neave: If counsel will tell me what the fact is, I will stipulate to it.

Mr. Lewis Lyon: The fact is that it was a drawing supplied the Weber Showcase & Fixture Company by Refrigeration Engineering of Los Angeles under the date of December 23, 1941 and was drawn by their engineer, Mr. Kirkwood. [238]

Mr. Neave: Very well.

The Court: So stipulated?

Mr. Neave: So stipulated.

(The document referred to was received in evidence and marked Defendant's Exhibit BB.)

[Note: Defendant's Exhibit BB will be found in the Book of Exhibits at page 1525.]

Mr. Lewis Lyon: Mr. Walling, please.

C. L. WALLING

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name.

The Witness: C. L. Walling.

The Clerk: Your address?

The Witness: 1150 North Western Avenue, Los Angeles.

The Clerk: Take the stand.

Direct Examination

By Mr. Lewis Lyon:

Q. What is your occupation, Mr. Walling?

A. Refrigeration contractor.

Q. How long have you been in the refrigeration business? A. About 23 years.

Q. What was your occupation or what company were you connected with during the years 1938, 1939, 1940 and 1941? A. York Corporation.

Q. Where? A. Los Angeles. [239]

Q. In what capacity?

A. I started as sales supervisor of the commercial department, and the last four years I was the manager of the commercial department, including sales, engineering and construction.

Q. What is your training in refrigeration engineering?

A. Well, I took a 2-year course in engineering at Siebel Institute of Technology in Chicago, and the 12 weeks' course with the General Refrigeration Company at Beloit, Wisconsin, and a 12 weeks' course supplied by the Vilter Manufacturing Company of Milwaukee, Wis-

(Testimony of C. L. Walling)

consin, and the rest of it is all of the engineering data that was available to the engineering personnel of the General Refrigeration Company, the Vilter Manufacturing Company and the York Corporation and the Kelvinator Corporation, and of course my practical experience in the business since 1923.

Q. Are you acquainted with Mr. "Hi" Jarvis here in the room? A. Yes, sir.

Q. When did you first meet Mr. Jarvis?

A. Either in late 1935 or early 1936.

Q. When did you first hear of a system of using water for defrosting coils in a sub-zero chamber?

A. The Recold unit was developed about 1938.

Q. When did you first hear of it? [240]

Mr. Neave: I move to have that stricken out as to when the Recold unit was developed. He is not competent to testify about that.

The Court: I understood his answer to be, when the Recold unit was developed that was about 1938.

The Witness: That is right.

The Court: That is what you meant, you heard of it in 1938?

The Witness: I heard of it in 1938; that is right.

Mr. Neave: Very well.

By Mr. Lewis Lyon:

Q. Do you remember the conditions under which you first heard of that unit?

A. I don't recall whether it was a bulletin I received or whether Mr. Jarvis himself told me about the unit. That is, when I first heard of it. I heard it from both sources, but I don't remember which was first.

(Testimony of C. L. Walling)

Q. Do you remember how you received that idea? What did you think of it when it was suggested to you?

Mr. Neave: I object to that, your Honor, as not pertinent, what he thought.

The Court: I think the form of the question is probably improper. You have qualified this witness as an expert and you can ask him what his opinion is now or whether or not he had an opinion at some other time. [241]

Mr. Lewis Lyon: All right. I will reframe the question, your Honor. Thank you.

Q. What was your opinion of such a system when it was first presented to you?

The Court: Did you have any opinion?

The Witness: I had a reaction when I heard of it.

The Court: Did you have an opinion?

The Witness: It was an opinion; yes.

By Mr. Lewis Lyon:

Q. What was that opinion?

A. In my opinion it was just unsound.

Q. Can you state of your own knowledge as to whether a similar opinion was entertained by the other engineers connected with the York organization that you know?

Mr. Neave: I object to that, your Honor, too.

Mr. Lewis Lyon: Whether he can or not, your Honor. It is preliminary.

The Court: Objection overruled.

The Witness: Well, as I recall it—

The Court: Do you know, or can you state?

The Witness: I can't state exactly of a particular discussion with them. I know that there was a number of them but I can't recall a particular one.

(Testimony of C. L. Walling)

By Mr. Lewis Lyon:

Q. Did you form any idea during those discussions as [242] to how they received the idea of the Recold water defrost system?

Mr. Neave: Surely, your Honor, that can't be proper testimony.

The Court: Well, I think that is probably correct. However, in the matter of opinion and prior art, etc., I think he can ask generally.

Mr. Neave: The witness has already stated, your Honor, that he can't specify any specific instance. Now all he can talk about is his general impression about what somebody else had an impression about. It seems to me it is so far away that it hasn't any probative value to be received in evidence.

The Court: I think so. Objection sustained.

By Mr. Lewis Lyon:

Q. Was the system generally discussed when it was first presented?

A. Yes. In our department it was.

Q. Who was there in your department of the York Corporation at that time?

A. You mean to name the individuals?

Q. Yes.

A. That would be hard to name. Myself, Eddie Collins, Don Beck, A. B. Lewis, Milton Van Epps, I believe Tommie Toppan, J. C. Lewis, and then a crew of men in the installa- [243] tion and service department that I can't possibly recall all of their names.

The Court: These were all employees of the York Corporation?

(Testimony of C. L. Walling)

The Witness: Yes, sir.

The Court: I think I will reverse myself on that. I believe it would be admissible. I was thinking generally, but here I had overlooked the fact that these were employees of the York Corporation, the opposite party in this case, and I think whatever statements they had to make are admissible as an admission against interest. Now what admission against interest it will be, I do not know, or what weight should be attached to it, I do not know, but I believe it is admissible for that reason.

Mr. Neave: Well, your Honor, it seems to me if it is going to go in as admissions against interest it has to be something specific with respect to who said it, when, etc.

The Court: I think that an admission against interest is not subject to the hard and fast rule that you have when you are impeaching a witness. In other words, that is, the rule so far as impeachment is concerned.

Mr. Neave: But it has to be sufficiently definite, your Honor.

The Court: Yes, I think it has to be sufficiently definite so that the other side can identify it and find the people and produce them to testify to the contrary.

If a sufficient foundation is laid—I don't think there was a sufficient foundation to permit the admission of the testimony in the present state of the record. [245]

Mr. Lewis Lyon: I don't think there is a specific question calling for a specific answer from the witness that is pending.

The Court: There isn't. I am reversing the ruling I made a few minutes ago. I don't know that he stated the objection, but the answer was inadmissible on the ground that no specific foundation had been laid, and that

(Testimony of C. L. Walling)

is what I wish to have my ruling on, rather than leave it on the ground that it is inadmissible as hearsay.

Mr. Lewis Lyon: I see.

Q. By Mr. Lewis Lyon: Do you recall any specific conversation with any employee of the York Corporation when this idea of the Recold water defrosting was first introduced to you and the York Corporation?

The Court: On or about that time?

Q. By Mr. Lewis Lyon: —on or about that time.

A. Will you read that for me, please?

(The question was read.)

A. I can't recall a specific conversation with a specific individual. I just can't recall it.

Q. Did you ever recommend to any one in the York Corporation that they try to use or install in a system the Recold water defrosting coils?

A. Counseling with the engineering department, I decided not to use them. [246]

Q. Why?

A. For the reason that I have stated before. It was something new to us. It was untried. We did not propose to experiment with it, and without a careful investigation our reaction was that for zero temperatures you just didn't associate water with it, so we would not attempt it. We were going to do those things that we knew were sound, and let the new developments prove themselves before we passed it on to our customers.

Q. At any later date did you actually see such an installation in operation? A. Yes, sir.

(Testimony of C. L. Walling)

Q. After you saw that installation in operation, did you change your attitude toward the York Corporation utilizing such a system?

A. Well, when I actually had experience with the unit, I was no longer with the York Corporation.

Q. I see. You had discontinued your connection with the York Corporation before, to your knowledge, any use was made of it by the York Corporation?

A. Yes, sir.

Q. When did you sever your connections with the York Corporation? A. About October, 1941.

Mr. Lewis Lyon: That is all. [247]

The Court: Cross-examine.

Cross Examination

By Mr. Neave:

Q. Mr. Walling, whom did you work for prior to 1938? A. Well, I started with York in 1935.

Q. I thought you said 1938? A. No.

Q. Whom did you work for before 1935?

A. Well, in the order, as near as I can remember, Moser & Suor, Inc., in Kansas City, who were distributors for the Vilter Manufacturing Company and the Norge Corporation.

Q. And what do those companies make? What product?

A. Well, they were distributors of Vilter products and Norge products.

Q. What are those products?

A. Vilter Ice machines, and Norge appliances, radios and domestic refrigerators. However, in my connection I had nothing to do with the radio and appliances depart-

(Testimony of C. L. Walling)

ment. I was the manager of the refrigerating department. And prior to that I was with the General Refrigeration Company, manufacturers of Lipman Refrigeration Machines. When I severed my connections with them I was regional manager in Kansas City, having the Kansas City, the St. Louis office, and the Omaha office. Prior to that I was with the Watt Plumbing, Heating and Supply Company in Tulsa, Oklahoma, and we were distributors [248] for the Kelvinator Corporation and the Lipman at that time, which was later the General Refrigeration Company. That covers my experience.

Q. Now, prior to the time that you knew about the Recold unit, were you familiar with water defrosting units that were used in refrigerating spaces that were above freezing?

A. Water defrosting above freezing?

Q. Yes.

A. No, sir, we didn't use water defrosting above freezing.

Q. You were familiar with brine defrosting?

A. Yes, sir.

Q. And prior to 1936 the York Corporation made and sold refrigerator units that consisted of fin coils and a blower, did they not? A. Prior to 1936?

Q. Yes.

A. Well, prior to 1936 in the commercial department, which I was in, they sold a blower with a York trade name manufactured by the Trenton Radio Works.

Q. But they sold a complete unit?

A. A complete unit, fin coil unit.

Q. A fin coil unit? A. Yes, sir.

The Court: How was that defrosted? [249]

(Testimony of C. L. Walling)

The Witness: In our department, it defrosted automatically, by our selecting equipment large enough to give enough off period to defrost.

The Court: You just shut it off?

The Witness: It would shut off automatically. In other words, out of a 24-hour refrigerating period, we would select machinery that would operate for 16 hours, and each time it would shut off it would defrost, as long as we had refrigeration above freezing temperature, then it would start out with a clean coil.

The Court: What about below freezing?

The Witness: We did not use that type of unit below freezing.

The Court: That is, you did not use the fin and fan below freezing?

The Witness: No, sir.

Q. By Mr. Neave: Are you not familiar with the fact that such units were sold by York for below freezing application?

A. No, I was not familiar with that.

Q. Were you familiar with the fact that such units were sold with brine defrosting?

A. Oh, yes. You mean fin unit?

Q. Yes.

A. They didn't have those available in my department. [250]

Q. But the company did sell them, didn't they, prior to 1937? A. Oh, they no doubt did.

Q. And, also, such units were sold with hot gas defrosting?

A. Yes, they sold them with hot gas defrosting. Oh, I would like to—I recall—I don't know whether it was

(Testimony of C. L. Walling)

prior—no, it wasn't prior to 1936, because I started in with them in 1935, but in about, oh, I don't know whether it was '37 or '38, the records would show that, we sold blower units in an egg breaking and freezing plant here in Los Angeles with fin coils and a blower with below freezing temperature.

The Court: How was that defrosted?

The Witness: Shut down and defrosted.

Q. By Mr. Neave: You stated that, in your opinion, the Recold system of defrosting was unsound. Now, what do you mean by "unsound?" Why unsound?

A. Well, we simply—I clarify that by stating we made no thorough investigation. It was our opinion when it was put on the market. We didn't associate defrosting sub-zero temperature coils with water.

Q. I see. You didn't look into it at all?

A. We didn't look into it, no, sir.

The Court: In other words, your conclusion was that the water would freeze? [251]

The Witness: The water would freeze.

The Court: In sub-zero temperatures?

The Witness: We later found out it was a rather simple thing, but we didn't investigate it.

Q. By Mr. Neave: Who was it that you consulted with in the engineering department when you decided not to recommend its use?

A. Well, I would have to—in the decision at that time, I was not in charge of the engineering department. I don't believe. I would have to look at the record, because when I started with this branch out here in '35 I was only in charge of sales. Mr. Dalin headed our engineering department and Mr. Tuttle headed the installa-

(Testimony of C. L. Walling)

tion and service department. So after we had completed our work of engineering the job and selling, it left our hands and went to the engineering department. Then later in the construction department. But about 1938, and I think prior to 1938, I was given the engineering department and the installation and service department for commercial up to 10 horsepower. Now, it was in our conversations with all of those connected; I would say Dalin, and whoever was in there at that particular time. I can't place the time. I know the responsibility was mine to say that we would use an electric defrost or we would use a water defrost. I had to make the decision, and, of course, I didn't make decisions without discussing it with those people that were [252] doing that portion of the work.

Q. This was after the Recold people brought out their water defrosting unit? A. That's right.

Q. That was before you left?

A. That was before I left.

Q. That was sometime between 1939 and 1941?

A. I can't place the date, the time that the department was turned to me.

Q. All right. Now, what individual did you talk with in the engineering department?

A. It is impossible for me to recall a specific conversation.

Q. And you don't remember the date, any specific date? A. No, sir.

Q. Or any particular person, any specific person?

A. That's right.

(Testimony of C. L. Walling)

Q. What was Mr. Collins', Eddie Collins' position?

A. He was the commercial engineer. To make the picture clear to you, prior to the time that I took the engineering department for commercial, Mr. Dalin was the chief engineer of the branch, and he had an engineer assigned to commercial engineering, which was all the engineering below 10 horsepower, and Mr. Collins was that man. Now, it was Collins—they alternated. It was Collins, and then it was Tom Dixon, and [253] then there was Kenney Blessing. There was about three of them and they alternated on that particular job, and it was their function to approve the engineering from our department on contracts which we made.

Now, of course, the final authority or the final man who would accept it would be Dalin. These were checking engineers. They would check the design. Now, after our departments were separated, then I took Blessing to head the engineering of the commercial department, and then he became responsible to me instead of to Dalin.

Q. I see. Do you know whether or not—

The Court: Will you be through with the witness shortly?

Mr. Neave: I am not quite sure, your Honor. Are you thinking about a recess?

The Court: Yes. I thought if you were going to be through shortly, we could excuse him.

Mr. Neave: I think I will be.

The Court: All right. We will go ahead.

Q. By Mr. Neave: Do you know whether or not prior to 1937 other companies, other than yours, made units that were sold with fin coils and fans?

A. Oh, yes.

(Testimony of C. L. Walling)

Q. Carrier, for instance? A. Yes, sir.

Q. And who else? Vilter? [254]

A. Vilter. I think some of the larger ones. Now, let's see. Prior to 1937?

Q. Well, yes.

A. I don't recall Vilter having any fin coils in their lines, because when we distributed their line in Kansas City we bought our blower units elsewhere. We bought the machinery from Vilter and bought the pipe coil units from Vilter, but we had to purchase fin coil units from other sources of supply.

Q. And you make up units yourself?

A. No, we would make up a complete job. We would buy the high side from Vilter, and we would buy the low side, if it were going to be a blower unit, from an outside source, oh, various ones, depending on which one could fit the application best, and we would install the whole unit.

Q. Prior to the time you came with York you sold these complete units, fin type coil units?

A. Oh, yes.

Q. That was a common unit? A. That's right.

The Court: Did you sell them for sub-zero?

The Witness: No, sir, we didn't use fin coils for sub-zero.

The Court: For sub-freezing?

The Witness: No, sir, we didn't use them for that. [255]

Q. By Mr. Neave: Why not?

A. Because of the defrosting problem. They would just ice up quickly and we hadn't found a way to get it defrosted other than the hot gas defrosting or brine de-

(Testimony of C. L. Walling)

frosting, and in using the fin it made it rather an impractical job.

Q. Don't you know, actually, that there were brine and hot gas defrosting jobs that were sold for use in below freezing?

A. In the larger units. We confined our activities to the smaller ones. We could do it much easier with pipe coils. They were in larger units, and there were brine spray units. We sold some brine spray units, but they would be in chill rooms and in small packing plants.

Q. That was with the fin coils?

A. Some with fin coils, but really usually with pipe coils. They seemed to make a better job.

Q. What did you say your occupation was now?

A. I am in the refrigeration contracting business, my own business.

Q. Your own business. Where is that?

A. 1150 North Western Avenue.

Q. In Los Angeles? A. That's right.

Mr. Neave: May I be excused a minute, your Honor? That is all. [256]

Mr. Lewis Lyon: That is all, Mr. Walling.

The Court: You may be excused. We will have a short recess.

(Short recess.) [257]

Mr. Lewis Lyon: Your Honor, in the original file, in the court's file, there is a stipulation, and which my copy of that says was filed on March 14, 1946. It is a stipulation with respect to the defendant's structures. I have another copy of that stipulation here.

The Court: March 15, 1946?

Mr. Lewis Lyon: March 15, 1946.

The Court: It has exhibits attached to it?

Mr. Lewis Lyon: I would like to offer that stipulation at the present time in evidence, or a copy of it, if the court desires to maintain that in the file, as the defendant's next in order, establishing the fact of the infringement and the infringing structures.

There are two structures identified there and after your Honor has determined which copy he would like to have me introduce in evidence, I will discuss the two different structures.

The Court: Is there any difference in the copies? The exhibits are bad in this one. Are they any better in your copy?

Mr. Lewis Lyon: They are not an awful lot better in this one, your Honor. In fact I think that this is perhaps a copy of photostats that I had to have made off of that one. No, I guess this is another copy that Mr. Neave provided me with. It has his writing. Is that right? [258]

Mr. Neave: Yes.

The Court: The blueprints here are readable; the others are in pretty bad shape.

Whatever you wish, the original stipulation can be introduced in evidence. Did you wish it copied in the record?

Mr. Lewis Lyon: The one I have here is not a signed copy, it is a copy that we made from that.

Mr. Neave: You can compare it.

Mr. Lewis Lyon: I will use this one and it will probably be better to keep that one in the file.

The Court: All right.

The Clerk: CC.

Mr. Neave: I have no objection to it, I only object to Mr. Lyon's characterization of it. He said it established infringement.

The Court: That is the purpose of it.

Mr. Lewis Lyon: The purpose was to establish infringement.

The signatures in the stipulation are typed. I presume there is no objection to that. They may be considered the same as if they were signed.

Mr. Neave: Certainly.

Mr. Lewis Lyon: In that stipulation, your Honor, there are two structures described, one the description of the unit sold to private concerns, the other the description of Government sale of unit V-30. [259]

In this type of case, your Honor, under the statutes, it is not possible for us to maintain an action for infringement because of the sale of the units to the Government so that in our establishment of infringement we will, of necessity, be limited to establishing infringement of the type of structure sold to private concerns. Our only cause of action for the material sold to the Government would be under an action in the Court of Claims, which we have not taken, so that of necessity I will have to confine our comparison and analysis of infringement to the private concern construction.

I don't believe that it is possible to determine in this action the question of whether or not the structures which were sold to the government do or do not infringe the patent in suit. That can only be determined by an action brought in the Court of Claims.

Mr. Neave: That is correct.

The Court: Very well.

Mr. Lewis Lyon: The only purpose therefore that that type of construction can have in this suit is with respect to the allegations of the complaint for declaratory judgment, and cannot enter into the cross-claim at all.

The Court: If the court has jurisdiction to decide the validity of the patent under the declaratory relief act, it certainly will affect the sales that were made to the Government as to whether they did or did not infringe. [260]

Mr. Lewis Lyon: I don't think so.

The Court: The Government is not here.

Mr. Lewis Lyon: There is a particular statute which limits this court's jurisdiction.

The Court: Use by the Government could be introduced in evidence to show use, commercial acceptance.

Mr. Lewis Lyon: But that is all.

The Court: I think that is right.

(The document referred to was received in evidence and marked Defendant's Exhibit CC.)

(The stipulation referred to is, in words and figures as follows, to wit:)

[Note: Defendant's Exhibit CC will be found in the Book of Exhibits at page 1527.]

Mr. Lewis Lyon: Mr. Doble. [267]

WILLIAM A. DOBLE,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, sir.

The Witness: William A. Doble; D-o-b-l-e.

The Clerk: Your address?

The Witness: 690 Mills Building, San Francisco.

Direct Examination

By Mr. Lewis Lyon:

Q. Mr. Doble, you are a graduate engineer, are you?

A. Well, I am not a graduate engineer in that I didn't graduate from university. I was attending Stanford University, majoring in mechanical engineering, when the first World War broke out, and at that time the Ordnance Department of the United States Army sent representatives to Stanford urging the engineering students to apply for an examination for commission in the Ordnance Department.

I followed their suggestion and was commissioned a First Lieutenant in Ordnance, and I served during the war, and when I returned to the Coast I did not return to Stanford but continued on certain development work and engineering work which I carried on at the same time I was attending university.

Q. Did you follow through with the second World War in the Ordnance Department, Mr. Doble? [268]

A. Yes, sir, I did. I was commissioned a Major and served for three years and eight months and was discharged as a Lieutenant Colonel.

(Testimony of William A. Doble)

Q. Have you ever testified before any of the courts of this district as a patent expert?

A. Yes, sir; many times.

Q. Will you name some of the cases in which you have so testified?

A. I have a list of them here, Mr. Lyon; if you want to save time I could hand those to the reporter.

The Court: Read them.

The Witness: Olive M. Reynolds v Killefer Manufacturing Company.

Roderick Lean Company v Killefer Manufacturing Company.

Six Wheel Corporation v Sterling Motor Truck Company.

Heber F. Towner v Brenneis Manufacturing Company.

Dinuba Steel Products Corporation v Killefer Manufacturing Company.

George D. Parker and Charles E. Evans v A. Fox.

Handy Roll Company v Dennison Manufacturing Company.

William Cords v Coil Manufacturing Company.

James H. Chambers v Roeding Fig & Olive Company.

John C. Creagmile and Bear Manufacturing Company v John Bean Manufacturing Company.

Shick Dry Shaver, Inc. v Nicholl, Inc. [269]

Super Mold Corporation v Barrett Tire Company, Ltd.

Super Mold Corporation v Thomas F. Bacon.

Bacon Vulcanizer Manufacturing Company v Super Mold Corporation.

The Independent Register Company v Charles Wheeler.

(Testimony of William A. Doble)

Patterson-Ballagh v Rubber Sleeve, et al.

Roads Construction Company v Standard Steel Works.

Doble Laboratories v Thomas Day Company.

W. C. Phillips and Fred J. Day, Jr. v Frank Fernandez.

Northhill Company, Inc. v R. S. Danforth.

William Josephian v Stuart Oxygen Company, Ltd.

By Mr. Lewis Lyon:

Q. Have you ever personally done any work in connection with the problem of defrosting refrigerator coils?

A. I have done it in this connection. Having trouble with the defrosting of coils in the apartment house in which I was temporarily living in Los Angeles, I conceived the idea and received a patent on an electric form of defrosting.

Q. In conjunction with your preparation to testify in this case, have you inspected any of the form and devices here identified as the Recold fin type coil manufactured by Refrigeration Engineering?

A. Yes, sir.

Q. Have you seen any of those devices in operation?

A. Yes, sir. [270]

Q. Have you studied their operation?

A. Yes, sir.

Q. Do you understand them?

A. Yes, sir.

Q. Have you made a study of the McAdam patent in suit?

A. Yes, sir.

Q. And the art which has been cited against that patent in the answer of the plaintiff to the cross-complaint?

A. Yes, sir.

(Testimony of William A. Doble)

Q. Have you made any study and comparison of the structure of the McAdam patent with the structure as manufactured and sold by the plaintiff to private concerns, as the same is illustrated in the stipulation, Defendant's Exhibit CC? A. Yes, sir; I have.

Q. Have you prepared any charts illustrating the two structures? A. Yes, sir.

Q. I have here a chart entitled "Infringement Chart," was that prepared by you and under your supervision, Mr. Doble? A. Yes, it was.

Mr. Lewis Lyon: For the purpose of illustrating the witness' testimony I will offer at this time the Infringement Chart as Defendant's Exhibit next in order. [271]

The Court: Is that the same as those on the board?

Mr. Lewis Lyon: To a considerable degree, yes, your Honor, in a small form and more convenient for the parties to use.

The Court: It is the same thing only smaller?

Mr. Lewis Lyon: It is the same thing only smaller.

The Court: Very well. That will be marked DD.

(The document referred to was marked Defendant's Exhibit DD for identification.)

Mr. Lewis Lyon: In other words, it breaks down an analysis of the patent in suit contained on Exhibit DD which is not on the board at the present time.

The Clerk: These are not in evidence yet, your Honor?

The Court: No, they are just marked for identification presently.

You are not offering them in evidence now, are you?

(Testimony of William A. Doble)

Mr. Lewis Lyon: I offer them for the purpose of illustrating his testimony. I can reserve the offer until after the testimony is in.

The Court: I think they ought to be marked for identification now until they are identified.

By Mr. Lewis Lyon:

Q. In Exhibit DD for identification, Mr. Doble, you have included a series of drawings marked respectively "Defendant's Structure, Normal Operation," compared with [272] "Plaintiff's Structure, Normal Operation"; "Defendant's Structure, Defrosting Operation," "Plaintiff's Structure, Defrosting Operation"; "Defendant's Structure, Drainage Operation," "Plaintiff's Structure, Drainage Operation." Those drawings were prepared by you from what?

A. Those drawings were prepared by me from the drawings in the McAdam patent, Defendant's Exhibit A, and from the description and blueprints contained in the stipulation setting forth plaintiff's structure.

Q. That is plaintiff's commercial structure?

A. Yes, sir.

Q. And those are, you state, an accurate representation of both structures?

A. They are a pictorial representation. Some of the dimensions have been enlarged or exaggerated so that we could properly bring out the colored differences of the different parts of the mechanism, but as far as the operation would be concerned, they are true representations of the patent and the stipulation of plaintiff's commercial structure.

(Testimony of William A. Doble)

Mr. Lewis Lyon: I do not know at this time whether the court deems it necessary to have this witness explain completely the structure of the patent in suit which he is prepared to do—

The Court: I think I understand the patent in suit, although I do not think that I would be able to read the [273] claims of the patent and understand that that is what he is talking about.

Mr. Lewis Lyon: I think then maybe I had better have the witness explain the patent in suit and explain his application of the claim, both to the plaintiff and the defendant's structure.

Q. Can you do that at the same time, Mr. Doble?

A. Yes, I think that would be a good way to handle it, Mr. Lyon. It would shorten the proceedings.

The Court: Because while I might understand the structure as it works, it may be that you do not claim it.

Mr. Lewis Lyon: That is right. It might possibly be.

Q. Will you proceed with that explanation, Mr. Doble?

A. Your Honor, may I step down so that I can use these drawings?

The Court: Yes. Do you have a copy of the patent?

The Witness: Yes, I have a copy of the patent here.

The Court: All right.

The Witness: I have now placed on the easel Claim 13 of the McAdam patent, Defendant's Exhibit A, which more definitely includes all of the elements of the invention. As there has been a great deal of discussion as to the invention, I will make my description of it rather short, and will follow generally the terms of Claim 13. [274]

(Testimony of William A. Doble)

Can the defendants see all right? Would it be better if I stood over on this side?

Mr. Reave: Yes, I think it would.

The Witness: Claim 13 first specifies or calls for: in combination with the refrigerated space.

The Court: Claim 13? This one I have here says Claim 1.

The Witness: Well, if your Honor will turn to the back of that, you will find claim 13. That is identical to the claim I have now placed on the easel.

The Court: Oh, I see.

The Witness: Claim 13 reads, "in combination with a refrigerated space."

Now, if we will consider the chart which is entitled, "Defendant's Structure Normal Operation," I will point out that refrigerated space. It includes, in part, the ceiling, side wall and base of a heavily insulated room, within which I have shown the refrigerated atmosphere as rather a clouded-like blue coloring, so as to bring out that within that space you have a circulation of air, and under a particular condition, namely, that the condition of that refrigerated space is sub-freezing, that is, below the freezing temperature of water.

Q. By Mr. Lewis Lyon: Yes, for example, what temperature? As you have specified it on the chart?

A. On the chart I have specified a minus-20 degrees, [275] which is 52 degrees below the freezing temperature of water.

The Court: The specification there is No. 10?

The Witness: The specification is No. 10, your Honor, and is so designated in that chart.

The Court: And in the patent?

(Testimony of William A. Doble)

The Witness: And so designated in the patent.

The Court: These numbers you use throughout are the same numbers used in the patent?

The Witness: Yes, your Honor. So one of the important things to start with, as Mr. McAdam sets forth in the first two paragraphs in his patent, is that his invention is directed to a defrosting mechanism mounted within a refrigerated space, which is maintained at all times below the freezing temperature of water.

So we have on the chart the refrigerated space 10 confined by the ceiling, wall, and the base of the room. I have illustrated in that room by a keg and four boxes to indicate that within that refrigerated space there is produce or articles to be refrigerated. Now, the McAdam patent next calls for—

The Court: Barrels,—they don't freeze whiskey, do they?

Mr. Lewis Lyon: Not generally, your Honor. I hope not.

The Witness: Your Honor, I don't know what is in that barrel. I just drew it.

The Court: Oh, it is just commodities? [276]

The Witness: Yes, sir.

Q. By Mr. Lewis Lyon: It looks a little like a whiskey barrel, your Honor. I don't know why he drew it.

The Witness: In my original sketch I had a bung hole in it, but the draftsman left it out, which made a difference.

So, in that refrigerated space the McAdam patent calls for, in the first element, a coil to be periodically defrosted. Now, that coil is indicated in the defendant's structure, as shown on the chart "Normal Operation," as a series of

(Testimony of William A. Doble)

circles with a hole in the center, representing a pipe, and a square member around that pipe, which is to indicate the fin on the pipe. That coil in the patent is designated by the reference character "5."

The Court: And throughout these diagrams?

The Witness: Throughout these diagrams, your Honor. So we have located within that sub-freezing space the refrigerating coil. In the same way, referring to plaintiff's Structure, the chart of "Plaintiff's Structure Normal Operation," we have a refrigerated space also, which I have designated by the numeral 10, and have colored with the same cloudy effect of light blue, to indicate that that space is maintained at 20 degrees below zero, which is 52 degrees below the freezing temperature of water. And located within that space we find a comparable set of refrigerator coils, which I have indicated on the chart entitled, "Plaintiff's Structure Normal Operation" [277] as circles in dark green, with a white center, representing the pipe, and a lighter green squared box structure surrounding the pipe, which represents the fins. So that we find in defendant's structure and in plaintiff's structure, in combination with the refrigerated space, the refrigerating coil 5.

The Court: That is on all the diagrams?

The Witness: That is on all the diagrams, the direct comparison between each.

Q. By Mr. Lewis Lyon: Is the identity of the structure and function shown?

A. Yes, there is a substantial identity of structure and function and result obtained by those two.

(Testimony of William A. Doble)

The next element calls for a spray-head positioned to distribute water over said coil for defrosting thereof.

The Court: That is 14 in the Defendant's Structure?

The Witness: Yes, and 14 on all of the charts.

The Court: Except in the Defendant's Structure they have kind of a pan affair?

The Witness: It is a pipe, your Honor. It is a series of pipes across the top.

The Court: In the Defendant's Structure it is a pan?

The Witness: It is a pan.

The Court: And in the plaintiff's is a pipe?

The Witness: They are both pipes but one is in a little [278] different form, that is all. In each of the charts I have shown the spray-head colored a rather bright red, and have indicated on each chart by the character "14 Spray Head" and the small "red" under it the part that represents the spray-head. That is true on Defendant's Structure. It is likewise true on Plaintiff's Structure.

Q. By Mr. Lewis Lyon: Now, Mr. Doble, the numbers you have used on the claim charts, how do they compare with the numbers on the structure charts?

A. The numbers on the claim charts correspond with the numbers and colors which appear on the illustrated charts.

The next element on claim 13 calls for—this is the third element—a fan, which I have indicated in all of the charts and by the character number "6" which is the same number as given in the patent, and have colored the fan a brown. The third element reads: "A fan '6' to move air of said space over said coil adapted to be discontinued during defrosting periods, whereby the air of said space does not

(Testimony of William A. Doble)

rise above the freezing point of water during the defrosting period."

The fan, or the normal function of any fan is to blow air, and is located in Defendant's device that it blows the air across the refrigerating coils, the green refrigerating oils into the refrigerated space, and the air which is blown by the fan is likewise drawn from that space so that [279] there is a recirculation of air contained within the refrigerated space.

In the same way in plaintiff's commercial structure, as shown on the charts, the fan is colored brown and indicated by the character "6." A different type of fan is used. It is used as a Sirocco type of fan, but it performs the same type of function, of blowing the air from the coil into the space.

The Court: Where does the air come out there?

The Witness: It comes out of the top pipe, the top brown pipe that sticks out of the metal case of the unit.

The Court: Oh, that is encased in a solid metal case?

The Witness: Yes.

The Court: And the fan sucks the air up and blows it out the top?

The Witness: Yes.

The Court: Or where does it take the air in?

The Witness: It takes the air in at the bottom, through the opening in the bottom of the case and the top of the drip pan. So that the circulation there in Plaintiff's commercial structure is to suck the air from the refrigerated space up through and across the green refrigerating coils into the brown fan and out the brown pipe at the top of the casing, returning that refrigerated air to the refrigerated space.

(Testimony of William A. Doble)

The Court: Plaintiff's fan sucks and the defendant's fan [280] blows?

The Witness: That is right, your Honor. They both perform the same operation for the same function and accomplish the same result.

The fourth element includes a drip pan disposed beneath said coil to receive water and ice gravitating from said coil. Referring to Defendant's structure, the chart of Defendant's Structure, in each of these charts the drip pan is indicated by the character "8" with the words "Drip Pan" after it and the letter "red" with a cross directly below, indicating that the coloring of the drip pan is indicated by red crosses. The same is true in each of the charts. In plaintiff's chart I have likewise shown the drip pan with red crosses and have indicated the drip pan with the character "8" and the words "drip pan" after it, with the wording below "red" with an "X".

Q. By Mr. Lewis Lyon: Mr. Doble, going back just a minute to the third element of the claim, was the fan "6" in either the Defendant's or Plaintiff's structures adapted to be shut off during the defrosting period?

A. Yes, they both are.

Q. They both are exactly the same in that respect?

A. They are both the same in that respect.

The Court: Go ahead.

The Witness: The fifth element calls for a self-draining [281] conduit "12" leading from said drip pan to points remote from said space. I have colored the conduit "17," which leads from the drip pan "8" with an orange cross, and a designated—

(Testimony of William A. Doble)

Q. By Mr. Lewis Lyon: That should be "12", shouldn't it, Mr. Doble? You said "17." Isn't that number "12"? A. Excuse me. I meant "12."

The Court: 12. You are reading No. 5 now?

The Witness: Yes, I am reading 5. Reading 5, it is "A self-draining conduit '12' leading from said drip pan to points remote from said space." Connected to the drip pan, which is shown with the red crosses, is a red conduit which is colored with orange crosses and has the designation "12 Drain Conduit," and that leads from the drip pan through the insulating walls, so that it conveys the products of the defrosting operation outside and away from the refrigerated space, and is so inclined and sloped so that a rapid draining of that water takes place, so that at no time does this water accumulate sufficiently long so that it would freeze and block up the passageways, even though the temperature of the refrigerated space is maintained some 50 degrees below the freezing temperature of water. So we have the drip pan and the drain, and the drain conveys whatever water is received by the drip pan outside the refrigerated space. That is very important, of course.

In Plaintiff's commercial structure, as shown on the [282] charts, connected to the spout from the drip pan is a conduit which I have indicated with an arrow and the numeral "12" and the words "Drain Conduit" and below that "Orange X."

The Court: Is there any significance to these fitting in, or does that indicate the extent of the space?

The Witness: No, that is mechanical. You mean the connections of the two parts?

The Court: Yes.

(Testimony of William A. Doble)

The Witness: Well, as the conduit goes through the insulated wall in Plaintiff's Structure they use a rubber hose, and the rubber hose is slipped over the red "X" part of the drip pan spout. It is just a matter of making it convenient.

The Court: That is in the Plaintiff's?

The Witness: In the Plaintiff's, yes, sir. I have a terrible time keeping the two separate.

The Court: Well, call them "York" and "Recold."

The Witness: I think that would be better, your Honor. Thank you. In York the conduit "12" as it passes through the side wall of the refrigerated space is a rubber hose which at the inner end is slipped over the spout or the drain portion of the conduit from the drip pan and carries out to a conduit or duct, which carries the products of defrosting to the place of disposal.

So, therefore, we find in the York structure a drip pan with a conduit, and it will be noted that the conduit is [283] inclined so as to rapidly drain.

The Court: So that it is self-draining?

The Witness: So that it will be self-draining, your Honor.

Returning now to the claim chart and reading element 6: "And an inclined water supply conduit (17)" which I have colored on the charts in each case with the color orange, "leading from a point remote from said space to said spray-head; said water supply conduit at said remote point provided with an opening normally open to the atmosphere whereby the conduit and spray-head respectively are self-draining."

Referring to the Recold unit, the chart of the Recold unit, it will be observed that the spout from the red spray-

(Testimony of William A. Doble)

head (14) is connected by a conduit (17), which is so designated on the chart by an arrow and the numeral 17 and word "Conduit" and under the word "Conduit" the color is designated as orange. That conduit is colored orange and indicates an open passage from the spray-head, which is so inclined as to be self-draining down to a 3-way valve.

The seventh element of claim 13 calls for: "And means (18) for periodically supplying water to said supply conduit during period when said fan is inoperative."

As we mentioned a few moments ago, during the defrosting operation the fan is shut off, that is, the brown fan indicated by the numeral "6." The valve in the Recold unit is indicated [284] by two colors. The housing of the valve is indicated as purple and includes in that a valve element which is colored yellow. The valve is shown in the Recold chart entitled, "Normal Operation" as closed to the supply of water. [285]

You will notice the upper part of the purple valve housing is connected with a pink conduit which is connected to the normal supply line of the installation in which the unit is mounted.

Q. By Mr. Lewis Lyon: Is that tap water?

A. That is ordinary tap water.

As shown in that chart, no water would flow into the spray-head.

In the York structure, the spray head—

The Court: As shown in the defrosting operation in your first chart, no water flows in to the spray-head?

The Witness: That is not in the defrosting, your Honor, that is in the normal operation when it is not defrosting, when it is cooling.

The Court: I see.

(Testimony of William A. Doble)

The Witness: There is no water flowing in there. It is a closed conduit.

The Court: I was looking at the wrong chart.

The Witness: In the York structure the series of spray pipes or spray-heads which are indicated in red are connected to the orange drain and supply conduit 17, and which in turn is connected to the upper end of a purple valve body which is known as the three-way valve.

As shown in the chart entitled "Normal Operation" the valve is open to drain so that any water that may accumulate [286] in the passageways, including the spray-head, the conduit, may freely drain out of the refrigerated space and to the point of disposal.

The Court: Before you get off of 17 and 14, spray-head what is it in York's structure that is that bulge?

The Witness: That is a pipe that runs across. There are a number of spray-heads which are each connected to that pipe that runs across.

The Court: I see.

The Witness: And there is a single pipe from that cross header which is connected to the valve and normally open to drain.

The Court: It comes up in one pipe and goes across into several heads?

The Witness: That is right, your Honor.

The Court: And then comes down that same drain pipe?

The Witness: Yes, your Honor. And in the same way—

The Court: It uses a pan?

The Witness: The same way that York uses a series of tubes and a conduit which is self-draining, the patent

(Testimony of William A. Doble)

uses a pan with the tubes and the valve is closed to the water but open to drain so that at all times that system is so open that water cannot accumulate there during its normal operation.

We might compare the charts entitled "Normal Operation" now to the charts entitled "Defrosting Operation," one for [287] the Recold and one for the York.

In the Recold chart entitled "Defrosting Operation" we will observe that there is a change. The yellow valve member confined in the purple valve body has moved down to close the opening to the vent, so that no longer can the spray-head and the supply conduit 17 drain.

The upper valve seat has been uncovered admitting the ordinary tap water to flow through the valve, through the conduit 17, up to the pan and to spray through the holes or openings, which are 15 in the patent, down across the coils, and you can see the drops dropping down through the coils, and as the water contacts the frost it melts the frost and washes it from the coils, it accumulates in the lower pan and the melted frost and the spray water or defrosting water drains out of the conduit 12 to a point outside of the refrigerated space before it has a chance to freeze.

The Court: Is there no different refrigeration coil? Is that encased in a solid housing such as the York?

The Witness: No, your Honor, only the sides.

The Court: Which sides? All sides?

The Witness: The front is open.

The Court: That is open?

The Witness: That is open.

The Court: And the back is open?

(Testimony of William A. Doble)

The Witness: The back is open where the fan is located. [288] That side is open, so that the air can flow through.

The Court: And the top is open and the bottom is open, so that the water can go through.

The Witness: But the top, you might say, is covered by the pan 14.

The Court: And the bottom by the pan 8.

The Witness: The bottom by the pan 8, and then there are sides that connect the pan 14 to the pan 8.

The Court: On the ends.

The Witness: On the ends; yes, your Honor.

The Court: All right.

Q. By Mr. Lewis Lyon: Mr. Doble, I hand you a photograph that shows a Recold unit. Can you explain that structure fully from that photograph?

A. Yes, I can.

The Recold unit includes the coils with fins which are mounted within a casing, the back of which is open and the front of which is open, so that the air can be blown by the fan through the coil section into the refrigerated space.

Mr. Lewis Lyon: I think it might be well to have that marked for identification so that the record will be clear.

The Court: These fins are solid, are they?

The Witness: They are pressed metal.

The Court: Pressed metal around the pipe?

The Witness: Around the pipe. They are sheet metal [289] pressed.

The Court: How far apart are they?

The witness: That would depend on the size of the coils. Some of them about a quarter of an inch apart, some more or less.

The Clerk: Defendant's Exhibit EE.

(The document referred to was marked as Defendant's Exhibit EE, for identification.)

(Testimony of William A. Doble)

The Witness: So that in the Recold unit we have the ordinary tap water flowing through the valve up to the spray-head through the coils, dripping down to the drip pan, where it is accumulated snow or ice which it has melted from the coils, and all of that water or liquid is carried out of the refrigerated space by the drain conduit 12.

It will be observed that the valve is also maintained outside of the refrigerated space.

In the York structure the valve is a manually-operated valve, whereas in the Recold it is electrically operated, but that makes no difference in the operation of the structure.

The Court: You mean that is shown here as manually operated?

The Witness: Yes.

Mr. Neave: Your Honor, we may be getting into some confusion in nomenclature by calling that Recold. Perhaps it might better be called the patented structure because, as I [290] understand it, actually the Recold structure doesn't have an electrically operated valve.

The Court: Whatever it is, let us keep on calling it Recold. We have changed its name once.

Mr. Neave: Very well. Then we will bring it out later.

The Court: Yes.

The Witness: Comparing the chart of the York structure, the one entitled "Normal Operation" as against the one entitled "Defrosting Operation" it will be noted that the valve handle has been swung from the upper position to a lower position.

The Court: It is open .

The Witness: Pardon me?

The Court: It is open.

(Testimony of William A. Doble)

The Witness: It is open; yes, your Honor; so that the water will flow up to the spray-head and the water is indicated flowing up there by broken lines and the water spraying out of the holes in the spray-head down across the coils picking up the frost and ice, depositing it in the drip pan and there the water is indicated being withdrawn from the refrigerated space and drained off to the sewer or other place of disposal.

I think it is very simple.

The last series of charts illustrate the Recold in the drainage operation. [291]

The Court: And the other one, they both do the same, they shut the valve off.

The Witness: They both shut the valve off and the process is reversed. The water that was in the drip pan, some of it you can see is still dripping down, the balance of it is being withdrawn from that solid refrigerated space so it would not freeze, and is allowed to pass through the 3 way valve down to the drain. The same water that drips off the coils passes through the conduit outside of the refrigerated space and to a place of disposal so that it will not freeze, keeping the system clear and ready for the next defrosting operation when necessary.

The same way with York. As illustrated in the chart, the chart entitled "Drainage Operation," the water is shown, a little of it, dripping off the spray-head, the balance of it returning through the conduit 17 down through the valve to the drain and to the sewer, and such water as is still dripping from the coils and is confined to the drip pan is being withdrawn through the conduit 12 outside the refrigerated space to the drain, so that the same operation we have in both the Recold and the York in immediately

(Testimony of William A. Doble)

withdrawing what remains of the liquid water in the system after a defrosting operation. They both have substantially identical structures, operated by substantially identical mode of operation, and they both produce identically the same result. [292]

Q. By Mr. Lewis Lyon: Mr Doble, in the claim chart introduced in Exhibit DD, you have analyzed claims 1, 2, 5, 6, 7, 8, 12 and 13 as being representative of the claims of the patent in suit, is that correct?

A. That is correct, Mr. Lyon.

Q. And in each of those breakdowns of the claims you have utilized numbers and colors. How do those compare with the numbers and colors of claim 13 which you have just specifically referred to?

A. They are the same. I have used the same system of colors and the same system of numbering throughout. The numbers are taken from the patent, and I have selected the colors for common use throughout. That is, each element that corresponds has been colored the same.

Q. And these numbers that you use, are they or are they not the numbers of the specification of the patent in suit? A. Yes, sir.

The Court: What do you mean here on that first page, on your claim 5 (3a), "Said means (18)"? That is the valve isn't it?

The Witness: Yes.

The Court: "Operates to finally draw air through said conduit 17." You mean it drains the water out?

The Witness: Yes, your Honor. I will point that out.

(Testimony of William A. Doble)

The Court: Is that the patentee's way for saying you [293] drain the water out, that the air must follow?

The Witness: That is about it. And it has one other effect, your Honor, in that as it pulls air in through these holes, it would tend to pick up any drops and carry them out.

The Court: You mean as it automatically drains?

The Witness: Yes, your Honor. It pulls the air in and pulls with it such drops as may be hanging in the openings so as to free the openings so they won't freeze up.

The Court: I see.

Q. By Mr. Lewis Lyon: In this claim chart, I note claim 2 says, "Adds to claim 1 (4) a drip pan (8) for said coil," and "(5) and a self-draining conduit (12) leading from said drip pan to points external to said space." What do you mean by that analysis there, Mr. Doble, adds to claim 1?

The Court: You mean everything he says in claim 1 plus this?

The Witness: That is right.

The Court: In claim 1 he is claiming the introduction of the water and in claim 2 he claims the introduction of the water in combination with the taking of the water out.

Mr. Lewis Lyon: That is what I wanted to make clear to your Honor.

Q. Is the analysis as you made of claim 13 in your statement that the York structure includes each element

(Testimony of William A. Doble)

operated in the same way to produce the same result and [294] whether a substantial identity of structure follows through with the rest of the claims that you have analyzed in the claim chart as compared with the patent in suit?

A. Yes, sir; that is true.

The Court: In other words, claims 1, 2, 5, 6, 7 and 8—

The Witness: 12 and 13.

The Court: And 12, are all put together in one combination in 13.

The Witness: Well, yes, your Honor. They are in different language, and fixes the combination up a little differently to broaden out the scope of his invention.

The Court: What do you mean, 13 is a different combination than all of the others?

The Witness: It is a different combination than claim 1, for example, which does not include the drip pan. You see, that is why I took claim 13.

The Court: What you mean is that 13 has everything that is in the claims that you have recited.

The Witness: Yes, your Honor.

The Court: What did you do with the other claims, claims 3 and 4, 9, 10 and 11?

The Witness: Claim 1, your Honor, includes a different combination. Now, somebody might thinkably use just those elements—there are only three of them—as set forth

(Testimony of William A. Doble)

in claim 1 and not use the drip pan and therefore try to avoid [295] infringement, so that in order to protect the inventor, not only does he have claim 1 but he has claim 13.

The Court: I am talking about 4.

The Witness: Claim 2, you see, adds to claim 1.

The Court: I am talking about 3 and 4 now: "The combination as in claim 1 and in which said conduit has a relatively low specific heat.

"The combination as in claim 1 and further including a drip pan for said coil and a self-draining conduit leading from said drip pan to points external to said space and having relatively low specific heat."

The Witness: Claim 3 is not included in my analysis. That brings in an entirely different element.

The Court: All right. Go ahead. Are you going to be through shortly with the direct examination?

Mr. Lyon: I anticipate I will; yes, your Honor.

The Court: Even if you get through you will come back tomorrow and say, there is just one thing more that I forgot.

Mr. Lewis Lyon: That might be true.

The Court: So I think we better recess now until 10:00 o'clock in the morning.

(Whereupon, at 4:35 o'clock p. m., September 18, 1946, an adjournment was taken until 10:00 o'clock a. m., Thursday, September 19, 1946.) [296]

Los Angeles, California; September 19, 1946; 10:00 o'clock a. m.

The Court: Ex parte?

The Clerk: No ex parte, your Honor.

The Court: Proceed in the York case.

Mr. Lewis Lyon: I wonder if your Honor has determined whether or not you will make the inspection as suggested?

The Court: Did you find a brine plant?

Mr. Neave: There is a brine plant that is a continuous brine spray here in Los Angeles. It is going all the time so that no frost forms, and it is going for the purpose of no frost ever forming on it. If you want to see the action of the frost formation, we will stop it until the frost forms before we get there and then start the brine and it will defrost it.

Mr. Lewis Lyon: That is an entirely different system.

Mr. Neave: It may be, but there doesn't happen to be one of those units here in Los Angeles.

The Court: I do not think it will be necessary for me to see a plant in operation.

Mr. Lewis Lyon: Anticipating that that might be your Honor's decision at this stage of the case, I have brought in a small unit so that if there are any points in the construction that your Honor has in mind the actual structure is here for observation. [300]

The Court: Very well.

Yesterday there was a witness here from Santa Rosa. What was his name, Payne?

Mr. Lewis Lyon: Yes.

The Court: Is he still here?

Mr. Lewis Lyon: No, sir. He is not. He went back last night.

The Court: I wanted to ask him some more questions.

What I had in mind was—I don't know whether the parties can stipulate or not—he said that he had three units there with the pipe construction.

Mr. Lewis Lyon: That is right.

The Court: And a crew of men working 24 hours a day, that he defrosted them by going in and scraping the ice off. I wanted to know how long it took.

Mr. Lewis Lyon: It is continuous, your Honor, with those three. According to his testimony it was continuous, that crew of men were working continually in those plants at all times.

The Court: But they weren't working 24 hours a day in each one?

Mr. Lewis Lyon: That is the way I understood it.

Mr. Neave: I don't think he stated that, your Honor. I didn't so understand it.

Mr. Lewis Lyon: They inform me that my interpretation [301] is incorrect; that there is a crew working in the three plants continuously.

The Court: I wanted to know how long it takes to scrape the ice off of one plant, which he said he could defrost with this plant in seven minutes.

Mr. Lewis Lyon: The only answer I could give would be that it would be a third of the total time, your Honor.

The Court: All right. Go ahead.

Mr. Lewis Lyon: At this time, your Honor, I would like to ask premission of the court to interrupt the testimony of Mr. Doble to put on two other short fact witnesses.

The Court: Very well.

Mr. Lewis Lyon: Mr. Johnston.

ELLWOOD B. JOHNSTON,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name.

The Witness: Ellwood B. Johnston.

The Court: J-o-h-n-s-t-o-n?

The Witness: Yes, sir.

The Clerk: Your address?

The Witness: 3890 Edgehill Drive.

The Clerk: Los Angeles?

The Witness: Los Angeles.

The Clerk: Take the stand. [302]

Direct Examination

By Mr. Lewis Lyon:

Q. What is your business, Mr. Johnston?

A. I am in the baking business, wholesale pie business.

Q. What is the name of the concern?

A. Johnston Pie Company.

Q. Are you an officer of that company? A. I am.

Q. What officer?

A. Well, it is a partnership. I am a partner.

Q. You are one of the partners? A. Yes.

Q. In conjunction with the operation of your business, do you operate a below freezing box of any kind, or room?

A. We operate a freezing box.

Q. What temperature is that freezing box

A. Zero.

Q. Zero degrees Fahrenheit? A. Yes.

Q. How long have you had that box in operation?

A. Since 1939.

(Testimony of Ellwood B. Johnston)

Q. What type of heat exchanger is used in that room?

A. You mean freezing unit?

Q. Yes.

A. One just like that one over there, only bigger. [303]

Mr. Lewis Lyon: The witness referred to the Recold unit sitting on the desk, for the purposes of the record.

Q. Have those units been in continuous operation in that room since 1939? A. They have.

Q. Have they caused any trouble in operation?

A. None whatsoever.

Q. How did that compare with other types of refrigeration that you may have used?

A. It is the best that we ever had.

The Court: What is its advantage over others? You say it is the best. Why is it the best?

The Witness: The only thing I know about it is that we get it defrosted a lot quicker. We don't have to shut the room off. It defrosts a lot quicker.

The Court: How long does it take to defrost?

The Witness: I don't know an awful lot about that machine except my men tell me it only takes about six minutes to run that water through there and defrost it.

The Court: You do not lose the temperature of the room?

The Witness: You don't lose the temperature of the room.

The Court: Do you have to move your material out?

The Witness: No, we don't move anything. We defrost it every morning. Every morning a man has a regular job of [304] defrosting that. And it is just about the most practical one that we ever had, that is all.

(Testimony of Ellwood B. Johnston)

By Mr. Lewis Lyon:

Q. Before the use of this type of freezing unit, had the Johnston Pie Company used other types of construction?

A. We did.

Q. What type was that?

A. We had a Kelvinator and we had a York ammonia machine.

Q. What kind of heat exchanger was used in the rooms with those installations?

A. I don't know what you call it, a lot of coils, great big coils.

Q. Exposed pipe? A. Yes.

Q. Do you know what method of defrosting is used in conjunction with that prior equipment?

A. Well, we had to shut the ice-box off and let it defrost. It just took a lot longer, that is all.

Q. You just shut the refrigeration off and let the air defrost it, is that right?

A. Yes, either that or we chopped it off.

Q. Did you have to take the merchandise out of the room in conjunction with that operation?

A. I believe we did. It has been so long ago, I [305] don't really remember.

Q. Do you recall the circumstances leading up to the installation of this Recold water defrost system in that box at the Johnston Pie Company?

A. There was a fellow that was building a box—I forget his name—and he recommended this outfit to me,

(Testimony of Ellwood B. Johnston)

and then this Mr. Kirkwood came around and he told us about it and took me down and showed me the coils and it looked like it was a pretty good idea so I thought I would try it out.

Q. In conjunction with that installation, did you extract any guarantee from Mr. Kirkwood or the Refrigeration Engineering?

A. I think they gave us a six months' or a year's guarantee. I don't remember for sure.

Q. You don't remember that particular instance?

A. No.

Mr. Lewis Lyon: That is all.

The Court: Cross examine.

Cross Examination

By Mr. Neave:

Q. Mr. Johnston, before you bought this Recold unit, had you ever used in your plant a blower unit type of refrigerator? A. No.

Q. The only thing you had ever used was a pipe type [306] where the pipes were around the room?

A. Yes. Then we had a Kelvinator, and I don't know what coils they had on that. I don't remember.

Q. And you have had no experience with any other type of blower unit than the Recold?

A. No, not in my plant.

Mr. Neave: That is all.

The Court: This witness may be excused?

Mr. Lewis Lyon: That is all, Mr. Johnston.

(Witness excused.)

Mr. Lewis Lyon: Mr. Tuttle.

WILLIAM R. TUTTLE,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: William R. Tuttle.

The Clerk: Your address?

The Witness: 1027 Val Vista, Baldwin Park.

The Clerk: Take the stand.

Direct Examination

By Mr. Lewis Lyon:

Q. What is your present occupation, Mr. Tuttle?

A. Salesman.

Q. In conjunction with what industry?

A. The non-ferrous, foundry. [307]

Q. Have you ever been engaged in the refrigeration business at any time? A. Yes, sir.

Q. When? A. From about 1923 to around 1940.

Q. Were you ever at any time employed by the York Corporation?

A. Yes, sir, during all that period.

Q. During all that period? A. Yes, sir.

Q. Where?

A. For the first about eight months I was in San Francisco, and then I was transferred to Los Angeles.

Q. Beginning then about 1924 up until 1940 you were employed by the York Corporation in Los Angeles, is that correct? A. Yes, that is about right.

Q. What were duties as employed by York Corporation?

A. You mean over the whole period? I changed jobs several times.

(Testimony of William R. Tuttle)

Q. Briefly starting out with your first employment.

A. I started in the shop in San Francisco and went on erection, and I handled the shipping in Los Angeles when I first came down here, worked in the engineering department [308] for a year, handled purchasing and finally purchasing, erection and service.

Q. What was your position with the company during the years 1938 and '39?

A. Handling purchasing and erection and service.

Q. Where, here in Los Angeles?

A. In Los Angeles.

Q. Did you ever during your employment become acquainted with the Recold system of water defrost?

A. Sure.

Q. When?

A. Shortly after it came out, but I can't tell you when.

Q. Can you state the circumstances of your becoming acquainted with that system?

A. Why, yes. Mr. Jarvis and I were friends in a business sense and he kept me posted on their developments so I knew while they were developing the defrost coil about it.

Q. Did you at any time import the story of water defrost to the York organization here in Los Angeles?

A. Yes.

Q. How was it received?

A. They told me it was an exploded idea, that York had tried it out years ago and it didn't work.

Mr. Neave: I object to what they told him, your Honor. [309]

The Court: I think you had better lay a better foundation.

(Testimony of William R. Tuttle)

By Mr. Lewis Lyon:

Q. Who did you talk with in that regard, Mr. Tuttle?

A. Mr. Dalin.

Q. That is the Mr. Dalin who is sitting here at plaintiff's table?

A. That is right; the plant engineer.

Q. Anyone else?

A. Yes, several members of the sales department, although I don't recall anyone in particular except Mr. Walling who was in the commercial department.

Q. When did this conversation take place that you say you had with Mr. Dalin?

A. After I had been out and seen several installations.

Q. Was there anyone else present at that conversation?

A. There might have been but I can't remember. Gee, that is a long time ago, you know.

Q. Will you state what both you and Mr. Dalin said at the time of that conversation?

The Court: In substance.

The Witness: Yes, sir.

After having been out and seen an installation, I reported back to Mr. Dalin what I had seen. I don't remember how much detail I went into, but I merely informed him about [310] it, when I received the answer that it was an exploded idea, that York had thrown it out years ago, or some such thing as that.

By Mr. Lewis Lyon:

Q. Did he make any statement as to whether or not it would or would not work in his opinion?

A. Oh, yes; it wouldn't work.

Mr. Lewis Lyon: That is all.

The Court: Cross examine.

(Testimony of William R. Tuttle)

Cross Examination

By Mr. Neave:

Q. Mr. Tuttle, you talked only with Mr. Dalin and to Mr. Walling about this matter?

A. No, that isn't what I said.

Q. Who else did you talk with?

A. I can't recall, different members of the commercial and industrial sales department. I couldn't tell you the names of them though.

Q. You don't remember the names?

A. Not necessarily; no.

Q. You said that it wouldn't work a moment ago. Was that your own conclusion, that it wouldn't work?

A. That isn't what I said.

Q. What did you say?

A. I said that Mr. Dalin said it wouldn't work. I [311] didn't say I did.

Q. What was your view?

A. I knew it would work.

Q. You knew it would work?

A. Yes, I saw it in operation.

Q. Did Mr. Dalin say why it wouldn't work?

A. No.

Q. He just said that it wouldn't work?

A. That is as I recall it.

Now don't you misunderstand me. That is a long time ago. This is my remembrance.

Q. Surely. That is all I am trying to find out, what you remember about it.

(Testimony of William R. Tuttle)

What else did Mr. Dalin say at that time?

A. I can't recall exactly what he said. He merely indicated that I had wasted my time and was wasting his, so just forget about it.

Q. Did he say why he didn't like water defrosting?

A. No, other than it wouldn't work.

Q. He just said it wouldn't work?

A. That is right.

The Court: When was this conversation? You say you left in 1940. Was it a year or so before you left the York Corporation?

The Witness: Yes, sir. I can't tell you exactly. I [312] would say—

The Court: About 1938 or '39?

The Witness: Somewhere around there; yes, sir.

By Mr. Neave:

Q. And you say that he didn't tell you as to why it wouldn't work? A. No.

Mr. Neave: That is all.

Mr. Lewis Lyon: That is all.

The Court: This witness may be excused?

Mr. Lewis Lyon: Yes, your Honor.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Lewis Lyon: Mr. Doble.

WILLIAM A. DOBLE

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Lewis Lyon:

Q. I believe, Mr. Doble, at the conclusion of yesterday's session you had started in to state your analysis of Claim 3 of the McAdam patent in suit, is that correct?

A. I don't remember starting on the analysis of [313] Claim 3. I was prepared to start on the analysis of Claim 1 and carry up through Claim 3, which is dependent upon Claim 1.

Q. Will you briefly carry through your analysis of the claims in this patent making it as brief as possible, beginning with Claim 1. You have made an analysis of Claim 13, I believe.

A. That is correct, sir.

I have now placed a large analysis of Claim 1 on the easel.

The Court: That is the same as the copies you have handed around, Exhibit DD?

The Witness: Yes, your Honor. All the large charts are merely duplicates of the smaller ones.

The Court: All right.

The Witness: And I will point out the elements of Claim 1 as they are found in the Recold unit and in the York unit.

The claim calls for "in combination with a refrigerated space." The refrigerated space in the Recold is the blue portion.

The Court: As you described it yesterday?

The Witness: As I described it yesterday.

(Testimony of William A. Doble)

In the York structure it is the same as I described yesterday.

“A refrigeration coil 5 in said space having frost accumulating surfaces.” The coil 5 is the green member on the [314] Recold chart and the corresponding green member illustrated on the York chart.

By Mr. Lewis Lyon:

Q. That is the fin coil that you were speaking about yesterday, Mr. Doble? A. That is correct.

Q. Will you by a reference to the Recold unit, which is now in court, set fourth for the benefit of the record the construction of that coil unit?

A. From the model which you have brought here?

Q. From the model; yes.

A. I am now describing the model of the Recold unit which has been brought into court. It includes a rectangular metal outer case which encloses a series of horizontal coils which pass horizontally back and forth through the conduits of the casing.

Q. With return bends at each end?

A. With return bends at each end.

Mounted on those coils are metal fins, as they are called. They are thin sheet metal pieces which are perforated to receive the pipe, and the pipe is expanded to make a close thermal contact with the fins, so that the heat absorbed by the fins is readily conducted to the cooling coil contained within the casing.

Mr. Lewis Lyon: I think that is the point that I desire [315] to make clear at this time, Mr. Doble. You may proceed with your analysis of Claim 1.

(Testimony of William A. Doble)

The Court: No claim is made in this patent for the fins or the unit?

Mr. Lewis Lyon: No, your Honor. This patent doesn't necessarily deal with the construction of the coil or the exchange unit in that respect.

The Court: Go ahead.

The Witness: The second element of Claim 1 reads: "A valve-controlled conduit 17 for periodically supplying water to said surfaces during a defrosting period."

And that included the red spray pan—pardon me—that included the conduit which is colored orange leading from a valve to the red spray pan 14 in the Recold unit; and included the yellow conduit 17 leading to the red spray head in the York construction as I described it yesterday. [316]

The element 3 of claim 1 calls for "and valve means 18 connected with said conduit for normally venting said conduit to the atmosphere to effect the draining of all portions of said conduit within said space after each defrosting period and for admitting water to said conduit during said defrosting periods."

That is the valve as indicated by the purple and yellow colors in the Recold unit as I described it yesterday; and is the purple and yellow valve as I described yesterday in the York unit.

The Court: What do you mean, "venting said conduit to the atmosphere"?

The Witness: Referring to the Recold chart, it will be noted, your Honor, that the valve member 25, which is the yellow member, is in a position to open the port 19 of the patent so that any water which may be in the drip pan or in the conduit has the free passage at all times during its

(Testimony of William A. Doble)

normal operation to pass out of the conduit 17 to drain to a point of disposal, which may be the sewer. And it will be noticed that that conduit carries outside of the refrigerated space because if any water were allowed to accumulate or drip within the refrigerated space of course it would turn to ice because it is far below the freezing temperature of water. [317]

By Mr. Lewis Lyon:

Q. Does that not mean that that is a free gravity flow to the atmosphere, Mr. Doble?

A. Yes, sir.

It will be noted that in each instance in the Recold job the conduit 17 is open and inclined at such a degree that any water in there will just run right out. That is the point, to get the water out.

The Court: What do you mean, "venting it to the atmosphere"? That isn't vented to the atmosphere.

The Witness: In many cases it is.

The Court: It just drips out on the ground?

The Witness: It just drips out on the ground.

The Court: Instead of going to the sewer.

The Witness: It can be either, depending on the election of the operator.

The Court: I see.

The Witness: In the same way the York valve, or the valve member illustrated by the color yellow in the York chart is turned to such a position that the port through it is open so that any water draining from the spray head through the orange conduit 17 will pass out to the atmosphere or to the sewer, in which instance you have identity in structure, mode of operation and result.

(Testimony of William A. Doble)

Now that concludes the entire combination as set forth [318] in that claim and with the coil may be successfully defrosted in a very rapid time without the difficulty of the spray head or the conduit freezing, so that it will be in condition for the next operation, which may be the following morning or two days later.

Are there any questions on that, your Honor?

The Court: You said by claim 1 you could defrost it?"

The Witness: That is right.

The Court: You can't defrost it unless you drain the water off, can you?

The Witness: That is correct. You have to drain the water out or it will freeze in there and your system is blocked.

The Court: What about the water that drips down over the freezer in claim 1 without a pan which is covered by another claim?

The Witness: That is true, and that is the difference between this claim and the other claims in the patent.

In that case you might do as the York manual suggests. In their manual they suggest if you use this type of coil in this type of a refrigerated space that is maintained below zero that you disconnect the drain from the pan because it will freeze up, and you substitute therefor a bucket to catch that drain water. Rather silly, but that is what they recommend. [319]

In some instances the people might want to save that water and might want to save it otherwise, but that would be possible, and that is the recommended practice in the York manual.

(Testimony of William A. Doble)

By Mr. Lewis Lyon:

Q. Proceed with claim 2, Mr. Doble.

A. Claim 2 includes the entire combination as defined in claim 1 with the addition of the drip pan, which is the red member, which has the lower member with the red x's which receive the water, and is found in the Recold as the member 8 and is found in the York as the member 8, likewise colored with red x's.

Claim 2 adds to that: "and a self-draining conduit 12 leading from said drip pan to points external to said space."

Now that is the drain conduit 12 which I pointed out yesterday, and is illustrated on the charts with the yellow crosses, and connects to the red crossed drip pan so that any water is immediately carried outside of the space and is either permitted to drip out on the ground or is carried to a sewer, or the two might be connected as in the case of the York where we find the spout from the drip pan is connected to the yellow drain conduit which, in turn, is connected to the drain from the inlet conduit 17. The two are just connected together so they drip either to the ground or [320]

The Court: Or in a bucket.

The Witness: Or in a bucket.

Mr. Neave: Which would be silly.

The Witness: It might be, but at least it wouldn't freeze out there in normal weather.

That concludes the combination of claim 2 which, added to claim 1, makes a little further step in the operative organization set forth in the patent.

The next claim is claim 5.

(Testimony of William A. Doble)

Mr. Lewis Lyon: Claim 3.

The Witness: Excuse me. May I take claim 5 because I have it on the chart.

By Mr. Lewis Lyon:

Q. Mr. Doble, confine your specific analysis to these claims now as to the elements, if any, which you have not previously covered and particularly pointed out as found in both of the structures. I believe that you have pointed out the exactness of the structures as to the elements which you have covered. Now if there is any element in any of the claims that you have not so covered, will you now cover that?

A. In claim 3 it calls for an element—I do not have a chart on claim 3—claim 3 adds to claim 1 the specification that, reading from claim 3: “The combination as in claim 1 and in which said conduit has a relatively low specific heat.” [321]

Now I didn’t mention that yesterday, I do not believe, as fully as maybe I should.

The patent discloses a preferred form of invention and states—

The Court: That discloses it in the description; it doesn’t disclose it in the claim. That is, it shall be a conduit with the least specific heat.

The Witness: Yes, and in the specifications it mentions that might be rubber or some other type of material that doesn’t readily store a volume of heat. That is what it means, that it is not capable of absorbing a volume of heat, so that when the fluid passes through it does not have the ability to freeze the water. That is what that means.

(Testimony of William A. Doble)

By Mr. Lewis Lyon:

Q. Do you find such a conduit in the York structure?

A. Yes, sir.

Q. In fact, the York structure uses, or employs even the suggested use of a rubber hose in the drain conduits, does it not?

A. Yes, it does.

Referring to the York structure in the large chart which I have, the section of the conduit 17 between the red spray head 14 and the immediate lower bend portion of the conduit 17, there is supplied a section of rubber hose which [322] connects the spray head to the lower portion of the conduit 17.

Also as the conduit 17 and also the conduit 12 passes through the walls of the refrigerated space there is provided a rubber hose.

Q. Now the next claim that includes a statement of operations which you have not discussed I believe is claim 5, is that correct, Mr. Doble?

The Court: Claim 4. You haven't said anything about 4.

By Mr. Lewis Lyon:

Q. Claim 4 merely adds a further element to claim 1 which you have already discussed in conjunction with your last answer, isn't that true?

A. Yes, sir.

The Court: Claim 4 was the rubber hose on the drain and the other was the low specific heat on the intake.

The Witness: That is right, your Honor.

The Court: All right.

(Testimony of William A. Doble)

The Witness: Claim 5—I think we discussed claim 5 yesterday—it is merely the size of the conduits which are such that as the water drains out of them the air will naturally flow in and follow the water so that the water flowing out acts as a piston, you might say, to suck the air in and carry with it any drops of water that might be hanging to the [323] drip pan or hanging to the sides of the conduit, so it helps to clean out the conduit so as to prevent later freezing or reduce the damage by later freezing.

By Mr. Lewis Lyon:

Q. I believe that having made that explanation in your previous answer and the answers previously given, you have made a complete comparison of the elements in claim 6 as set forth in your chart, isn't that true, Mr. Doble? A. That is true, Mr. Lyon.

Q. The same is true with respect to claim 7, is it not?

The Court: Except claim 6 adds a pan.

The Witness: We discussed the pan, your Honor. That is that lower drip pan 8.

The Court: Very well.

The Witness: Which is found in each.

By Mr. Lewis Lyon:

Q. Is there any element of claim 7 that you have not previously described and pointed out the similarity or exactness between the defendant's and plaintiff's structures?

A. No, sir. I have pointed all of the elements out as defined in claim 7.

(Testimony of William A. Doble)

Q. Now with respect to claim 8, have you discussed the specific definition of the invention as set forth in claim 8, Mr. Doble. [324]

A. Yes.

The Court: What is the difference between 7 and 1, 2, 3, 4, 5 and 6? 7 is merely a combination of all you have got in 1, 2, 3, 4, 5 and 6, isn't it?

The Witness: I think it is set up a little differently, your Honor. It defines specifically a spray head where in claim 1 the specific definition of the spray head is not made per se. It is included more generally in the second element which calls for valve control for supplying water to the surface of the defrosting surface during the defrosting period.

The Court: Claim 7 adds a spray head?

The Witness: It adds it in specific form.

Mr. Lewis Lyon: That is right.

The Court: All right.

The Witness: Claim 8 I have just discussed, which is the relationship of the pipe, that is, the diameter of the conduits, so that the air will be drawn through the conduits as they are drained to assist in the clearing of the conduits from moisture.

By Mr. Lewis Lyon:

Q. Have you discussed all of the elements in claim 9 or are all of the elements in claim 9 found in both defendant's and plaintiff's structure? That claim describes a specific form of valve, does it not? [325]

A. Yes, it does. I have already described the valve in both Recold and the York structures and have pointed out that they contain a plurality of ports and passages to obtain the result of maintaining the water supply conduit open to the atmosphere so it will drain at all times

(Testimony of William A. Doble)

excepting when defrosting, at which time the drain valve is closed and the water supply from the common tap water is connected to the supply conduit to feed water to the coils for defrosting.

Q. Is that valve described anywhere as being a three-way valve in any of these claims, Mr. Doble?

A. No, it is not.

Q. Is it equally possible to use two single valves as a three-way valve in accordance with the definition of these claims? A. Yes, it is.

Q. That is, put one valve on drain 12 and one valve on drain 17 and use them separately?

A. No, that wouldn't be right, Mr. Lyon. You have to put one, as I can point out on the chart, one valve would be put on the water supply which is indicated on the chart with the pink color. That is the supply from the tap water. You would have to put a valve there to shut that off.

Then you put a second valve down below on the conduit 17, down below the purple valve body so that in normal operation the lower valve, when the conduit 17 would be open, any moisture in the conduit 17 could drain. If you were going to defrost you would merely shut that valve off and open the valve on the tap water side to allow the water to flow up to the spray head, so that you could use two valves instead of the single three-way valve.

The three-way valve is a convenience and has some advantages, and the double valve setup has other advantages.

(Testimony of William A. Doble)

Q. Is there any element of claim 10 which you have not described and point out that is found in each of the structures, Mr. Doble? By either of the structures I mean plaintiff's or defendant's?

A. I believe I have covered all of the subject in claim 10 during my discussion of the two devices yesterday.

The Court: What is this, "fins arranged on said coil to provide vertical channels extending from end to end thereof for gravitational flow of water over said fins and coil and channels extending from face to face thereof for flow of air?" Do you have to have that kind of a fin in order to use this invention?

The Witness: No, you do not, your Honor. You can use any type of coil, whether it has fins or not. That claim is more specific to that particular type of coil.

You see, each claim is just a little bit different to cover a little different combination of means. [327]

By Mr. Lewis Lyon:

Q. That claim describes, does it not, Mr. Doble, the complete structure of the Recold unit using the fin type coil through which the air is blown and the water defrosting combination that is added to that specific combination of fin type blower coil?

A. Yes, Mr. Lyon. That is wherein it differs from the other claims.

The Court: What is this "thermosyphonic flow of air"?

The Witness: That is a high-powered word, your Honor, that means this, that if, for example, we take one of the hot gas or hot brine or other hot means for defrosting the coils and pump that hot fluid through the coils, the

(Testimony of William A. Doble)

coils would heat up. The heat in turn would heat the air. When the air heats it expands and the expansion of that air would be lighter than the cold air so it would rise and the cold air would fall.

The advantage of the Recold invention is that by the particular arrangement of the coils you do not get the same extent of that circulation due to the heating of the coil, that is, the circulation of the refrigerated air due to the heat of the coil, as you would if it were not en-housed the way it is with a top header and a lower header and the blower on the side.

The Court: All right. [328]

By Mr. Lewis Lyon:

Q. Now you have covered the addition of claim 11 to claim 10, and with respect to the slow heat conducting and specific heat conducting material, have you not, Mr. Doble? A. Yes, I have.

Q. Claim 12 is specifically included in your chart analysis, is it not? A. Yes, it is, Mr. Lyon.

Q. And set forth in detail showing each element, and you have described each element, its application to both structures as found in both structures in claim 12?

A. Yes, sir.

Q. The same is true with respect to claim 13?

A. Yes.

Q. Claim 14 differs, does it not, from the other claims in calling for the electrically operated valves

A. Yes, sir.

The Court: That is the only difference?

The Witness: Yes, sir.

(Testimony of William A. Doble)

By Mr. Lewis Lyon:

Q. That element is not used by the plaintiff corporation, as far as you know?

A. That is correct.

Mr. Lewis Lyon: That is all. You may cross examine. [329]

Cross Examination

By Mr. Neave:

Q. Mr. Doble, do I understand that all of the space within the four walls as shown in blue in your diagram is the refrigerated space? A. Yes.

Q. Everything inside of there is inside the refrigerated space?

A. Yes. That shows a portion of the refrigerated space. Normally the room would extend out larger. I have broken off one side of it.

Q. Yes.

The Court: Is the device there proportionate to the size of the barrels?

The Witness: No, your Honor. That is an artist's conception.

The Court: All right.

By Mr. Neave:

Q. In your analysis, which is Defendant's Exhibit DD, in making that analysis did you take the York unit as set forth in the stipulation with respect to the commercial unit? A. Yes, sir.

Q. That is, the unit that is sold to private concerns and not to the government?

A. That is correct. [330]

(Testimony of William A. Doble)

The Court: That is your description of the commercial unit?

Mr. Neave: I beg your pardon, your Honor?

The Court: That is the agreed description between you of what the commercial unit is?

Mr. Neave: Yes.

The Court: In other words, it is everything except what is sold to the government?

Mr. Neave: Yes.

Q. And I understand it, Mr. Doble, you derived your drawings from that? A. Yes, sir.

Q. And if there was any difference between your drawings and that stipulation, then your drawings are incorrect?

A. Well, my drawings are not a line-for-line duplication of that blueprint.

Q. I understand that. But structurally?

A. Structurally that is correct.

Q. I think you pointed out that there are many claims in the patent that are not limited to finned coils.

A. Yes.

Mr. Neave: Your Honor, I call your attention to the patent on page 2, column 1, line 22: "Also the present invention is directed to all manner of coils * * *"

Q. Now to your knowledge, finned type of coils for re- [331] frigerated units were old prior to 1937, were they not?

A. Yes—pardon me. I haven't finished my answer.

Q. I am sorry.

A. Yes, finned coils by themselves were very old before the date you have stated, but the fin coil is new in the

(Testimony of William A. Doble)

combination as set forth in those claims in this patent in which it is combined as an element.

Q. I understand that that is your position. Now I am asking you only as to each individual element. Alone the fin coil is old.

A. Alone the fin coil is old, but it is new and makes a new combination as set forth in the claims of the patent.

Q. Yes, you said that before.

The Court: There isn't anything there that isn't old, is there?

The Witness: That is right.

The Court: Fans are old, iron pipe is old, valves, rubber hose, pans are all old.

The Witness: Yes.

By Mr. Neave:

Q. Do you agree with that, that each of the elements is old.

A. Each of the elements is old but in being brought into this particular combination it has provided a new entity which is divorced from any one element and is the com- [332] posite of all of those elements which produce a new result which has never been produced before.

Mr. Neave: I think that is for your Honor to decide.

The Court: That is his position.

The Witness: That is my position.

The Court: But he concedes that all the elements obviously are old.

By Mr. Neave:

Q. You concede that all the elements are old?

A. Yes.

(Testimony of William A. Doble)

Q. Isn't it so that each of those elements individually perform the function which was the old function. Let us take them individually, Mr. Doble. The fan was old and that acts as a fan?

A. Yes, but it performs another function.

Q. Just let me ask this question first and then I will let you answer it further, if you want to.

A. But I thought you had finished your question.

Q. No. Is it so that it performs the same function of blowing? A. The fan blows.

Q. Yes.

A. But in doing so it causes a different conditions than you would normally have with just a blowing fan. It causes a deposit of frost upon certain coils and in this combination it must be shut off during certain parts of the operation of the cycle of that organization so it can't be just separated as a unit and say, well, a fan is a fan. Sure it is, but not in that combination.

Q. Let me ask you this: All of these claims are apparatus claims, are they not?

A. Yes, sir.

Q. There is no method claim among them?

A. No, there is not.

Q. And each claim is for a combination of elements which are structural elements, is that correct?

A. That is correct.

Q. Now the fan is old and operates as a fan?

A. The fan is old and operates as a fan to produce certain results in this combination, and if it didn't produce those results there wouldn't be any need of it in that particular combination.

(Testimony of William A. Doble)

Q. I am talking about the structure now, Mr. Doble. I think that you can answer that from the point of view of the structure. I understand what your position is about the combination, but now I want to know about the structure.

This structure of fan is to rotate and produce blowing of air, isn't it? A. At certain times.

Q. Yes. [334] A. Pardon me.

Q. I am talking about the structure.

A. Let me finish my answers, too.

At certain times it acts as a fan and at other times it acts as a fan.

Q. When it is turned on it acts as a fan?

A. When it is turned on it blows air.

Q. And when it is turned off it doesn't blow air?

A. That is right.

Q. And that was true of fans before, wasn't it?

A. Certainly.

Q. Let's take the next element, the coils. Now those finned coils were old, weren't they?

A. Finned coils?

Q. Finned coils themselves are old.

A. As themselves they are old.

Q. All right.

A. But new in this combination.

Q. Well, now, just answer the questions.

A. I did answer the question. I am giving you my explanation for that answer.

The Court: He can explain his answers.

Mr. Neave: Yes. I am perfectly willing to have him explain them.

(Testimony of William A. Doble)

The Court: He has been on the witness stand before. [335]

Mr. Neave: Apparently.

The Court: We will have a short recess at this time.

(Short recess.) [336]

The Court: You may proceed.

Mr. Lewis Lyon: Your Honor. I don't believe I introduced Exhibit DD in evidence. I would like to introduce it in evidence. That is the claim chart your Honor has. I do not believe it is necessary to encumber the record with the enlargements of that which the witness has specifically referred to, unless your Honor so desires.

The Court: No, I don't think it is.

(The document referred to was marked Defendant's Exhibit DD, and was received in evidence.)

[Note: Defendant's Exhibit DD will be found in the Book of Exhibits at page 1539.]

Q. By Mr. Neave: I think, Mr. Doble, we were on the fin coils when we stopped. Now, am I correct that the function of the fin coils in this device of the patent is to absorb heat? Is that right? A. That is correct.

Q. And that was the function of fin coils prior to this invention, was it not?

A. Yes, that was the function of fin coils prior to this invention, but the combination which includes those fin coils is new.

Q. That is your conclusion?

A. That is my conclusion.

(Testimony of William A. Doble)

Q. But so far as the functioning of fin coils is concerned, they functioned to absorb heat prior to the McAdam fin coils? [337]

A. Yes, but not in the combination such as disclosed in this patent, which is new, and which I have never seen before.

Q. Very well, you have never seen it before. But so far as the coils are concerned, they do absorb heat?

A. Yes, sir.

The Court: He has answered that.

Q. By Mr. Neave: All right. Now, then the valve,—I think you called that a 3-way valve?

A. You can call it a 3-way valve.

Q. Yes. That was an old type of valve?

A. I have already said it was a very old type of valve, but I have never seen it operate before in the combination of the patent in suit, where it maintains open for drainage a passage when there is a sub-freezing atmosphere, and then later can be operated to close that passage and supply water to that passage.

Q. Have you ever seen it operate to open, to allow liquid to go through the valve, and then closed to prevent the liquid from flowing through the valve, and to allow the liquid in front of the valve to drain out through the valve? A. May I have the question read?

(The question was read.)

Q. That is upstream, I mean, by “in front.”

A. It is rather a confusing question, isn't it?

Q. Well, what was the operation of the 3-way valve prior [338] to McAdam's invention?

The Court: It was identical with this except that it wasn't used to take it into this combination?

(Testimony of William A. Doble)

The Witness: That is right.

The Court: With your usual "but"?

The Witness: That is right.

Q. By Mr. Neave: And the function of all the parts of the combination was the same in the prior art except for the usual "but"?

A. I am sorry. I didn't get the question.

Q. Will you read it?

(The question was read.)

A. Well, they all separately are old, and they have had separate modes of operation, but in this combination you have a new entity which brings out a different result and a combined result of all of those elements to produce the final result which makes the thing successful. You can't eliminate the valve and have a successful unit. You can't eliminate the pipe and have a successful unit.

Q. I see. You agree with my question?

A. No, I don't agree with that.

Q. You agree, but. Now, Mr. Doble, in defrosting the Recold unit,—you have observed the defrosting of the Recold unit? A. Yes, sir. [339]

Q. After it has been defrosted, does water remain on the pipes?

A. Well, that is a relative question. You mean a thin film or a volume of water?

Q. Just any water.

A. The pipes are, you might say, wet.

Q. Yes. Have you ever observed hot gas defrosting?

A. No, I have not.

(Testimony of William A. Doble)

Q. Now, with respect to the spray-head, which I think you marked 14 on your drawings, Defendant's Exhibit DD, the patent shows an enclosed tank, does it not?

A. It appears to be a closed tank, yes, sir.

Q. Except the spray holes and the entrance?

A. I understood that is what you meant.

Q. Yes. What is the form of the spray-head on the Recold unit.

A. In the unit itself?

Q. Yes. Isn't it an enclosed tank, such as in the patent?

A. That I cannot answer. I haven't opened one of the structures to look at it.

Q. Now, if that tank is enclosed, I suppose that in order for the water to get out of it it must draw air in through the spray holes?

A. Not at the start. I can explain that this way,— [340]

Q. Will you, please?

A. Referring to the Recold chart on the easel, and especially to the one entitled "Defrosting Operation," it will be noticed that the inflowing water has trapped and compressed a body of air at the upper part of the enclosed spray-head. That pressure created there, as long as the drain is open, will immediately start the force to draw water out, and as the water recedes down the pipe, the drain conduit 17, air will be drawn through the openings 15, so that the water may proceed on down the pipe.

Q. Well, the water will not flow, I suppose, unless the pressure above the water in the enclosed tank is greater than atmospheric pressure?

A. Well, it would be very much higher than atmospheric pressure at the start, and would accelerate it and

(Testimony of William A. Doble)

give that water momentum, which would pull the air in from the little openings 15.

Q. And thereby allow the water to drain out?

A. Yes, sir.

Q. Now, have you got the patent before you?

A. Yes, sir.

Q. Turn to page 2. Well, before I ask you this question, Mr. Doble, was it not customary to stop the fan when defrosting on units that were in use prior to 1937?

A. Are you referring to sub-freezing or above-freezing [341] units?

Q. Either one.

A. Yes, I believe that was customary.

Q. With respect to your conduit 12, does the patent give any specific diameter for it?

A. No, not in dimensions. It defines the diameter such that as the water flows through it it will draw a slug of air along with it. If it is too large and the supply of water is too small, of course you would not do that in the same way.

Q. It does not give a specific length?

A. No, that would vary in each installation. That is a matter left to the normal installation engineer, who would know what length he needed to connect up to the unit as it is installed in the refrigerated space.

Q. It doesn't give any specific inclination of the pipe?

A. Only in so far as the drawing shows it in the patent. The drawings specifically indicate, you might say, two different slopes for each of the drain conduits. The slopes appear to be different in Figure 1 than they do in Figure 2, so the installation engineer could take his choice

(Testimony of William A. Doble)

and use either one, or any other that would perform the function of that combination.

Q. Well, both the conduits 12 and 17 have to be big enough and long enough and sufficiently inclined so as to [342] freely drain the water off?

A. I will answer that yes, this way: they have to be long enough to extend outside of the refrigerated space, but their length is not a very important factor with relation to their diameter.

Q. But that is left to the man who installs it, and he would know the proper size?

A. Yes, he would install—he could install the proper size from the teachings of this patent.

Q. And he would know what inclination is necessary in order to produce this slug?

A. Well, he is given two different inclinations in the patent, and he would use either anything in between—either those two or anything in between, so it is left to him to make his choice.

Q. Isn't that the same drainage that you have in draining water out of any vessel like a bath-tub or a sink?

A. No, not at all, because when you drain a bath-tub it is usually not mounted in a sub-freezing space.

Q. But you want to get the water out?

A. You want to get the water out.

Q. And you want to make the drain large enough in order to get it out?

A. Yes, and in most bath-tubs they don't make it large enough. It takes too long. [343]

(Testimony of William A. Doble)

Q. And in a kitchen sink when you see a swirl-pool going out, that is the slug of water going out and drawing air in?

A. I don't know if you would call it a slug of water. It is a current of water which is rapidly rotating and makes a little vortex and forces little air bubbles down.

Q. It pulls air through?

A. It pulls air through.

Q. Now, will you turn to page 2, column 2, line 33?

A. Yes, sir.

Q. That reads as follows:

“Also, in keeping with features of this invention the conduit shall be of rubber or some composition having a lower heat transfer factor and a lower specific heat factor than metal.”

I show you Plaintiff's Exhibit 100, and ask you to turn to page 592. Do you agree with the definition of specific heat given there, which reads:

“The specific heat of any substance is the ratio of the heat required to raise the temperature of a unit weight of that substance one degree and the quantity of heat required to raise the temperature of the same weight of water one degree, usually from 62 to 63 degrees F.”?

A. I agree with that, but that is only one of the [344] definitions.

Q. Yes, but that you do agree with?

A. Well, I agree with Mr. Kent, usually.

Q. Now, tell me, do you agree that the specific heat of rubber is .481, as shown on page 594 of Plaintiff's

(Testimony of William A. Doble)

Exhibit 100, Table 6? It is about the fourth item from the bottom in the right-hand column.

A. Of course, I will agree with the table. I know Mr. Kent's. I have used him many times and I know he sets forth the proper specific heat of rubber, but I am not sure from this table whether the specific heat of rubber, as indicated here, is per weight or per volume, which would make some difference.

Q. I see. Will you look at Table 1?

A. Pardon me. For example, the specific heat of rubber per volume is .25 to .44. Of course, that deals with pure rubber. We are not dealing with pure rubber. Hose has a lot of cotton and other materials in it, but, as we know it in commercial practice and used in this instance, it does have a low specific heat. That is what he means, as he states in the first part of that paragraph.

Q. I didn't ask you what he means. I am just asking your about this exhibit here.

Mr. Lewis Lyon: Finish your answer, Mr. Doble.

Q. By Mr. Neave: All I want to know is whether you [345] agree.

Mr. Lewis Lyon: Your Honor, I believe the witness should have an opportunity to finish his answer.

Mr. Neave: May I finish my statement first?

The Court: Was your answer calculated to explain the previous portion of your answer concerning specific heat?

The Witness: Yes, your Honor, in this way: because the patentee is entitled to make his own definition, and I think we have got to look to the patent for just what he is trying to convey to the John Doe who is going to make and put this unit into operation. And his definition there

(Testimony of William A. Doble)

is this, that he wants to put a substance in there that has very little capability of storing or of absorbing heat, so that when the initial water flows in that conduit, by its inability to absorb heat from the water will not cause that water to solidify. That is what is meant by that paragraph of that patent, and that is meant by the specific heat definition and the thermal heat content he refers to. This is a dislocated definition of specific heat. It deals with pure materials, and it is not definite here whether it is per volume or per weight.

Q. By Mr. Neave: All right. Will you turn to Table 1 of Plaintiff's Exhibit 100 and tell me whether or not you agree that the specific heat of copper is .0951, which is shown in the left-hand column of that table, the fourth item from the bottom? [346]

Mr. Lewis Lyon: I believe the witness has already answered that, that he agreed with Kent's tables, so far as they go in each respect.

The Court: He has a right to ask him.

The Witness: Naturally I agree with what Mr. Kent says, as I stated before, but this table—I haven't been able to determine from this table whether that is based on the specific heat by weight or by volume, and, of course, copper is very heavy and it makes a difference.

Q. By Mr. Neave: Now, I would like you to tell me whether or not, in your opinion—or, not in your opinion, but as a matter of fact, to your knowledge, rubber has a lower specific heat factor than metal.

A. Yes and no. If you take it by weight, rubber has a specific heat from .27 to .48, of course, depending upon its purity. That is by weight. And by volume it is from .25 to .44.

(Testimony of William A. Doble)

Q. All right. What are the corresponding metal—

A. Iron is from .1, by weight. By volume, it is .77. It is practically seven times, the difference, when you take it by weight or by volume. Brass, which is very close to the alloy, includes a great deal of copper, and is .09 by weight and .74 by volume. So it depends on which specific heat you are talking about.

Q. What is the figure on copper? [347]

A. I don't have it for copper here.

Q. Now, if you compare the specific heat by volume of rubber and brass, which is the lower?

A. Rubber is the lower.

Q. And if you compare it by your other system?

A. By weight?

Q. By weight. A. Brass is the lower.

Q. Now, is there any indication in the patent as to which the patent was referring to? A. Yes.

Q. Where is that?

A. Not in just those words. Referring to that same paragraph on page 2 of the patent, commencing at line 33 in the second column, the patentee states:

“Also, in keeping with features of this invention the conduit shall be of rubber or some composition having a lower heat transfer factor.”

Now, that is the part that you are overlooking. The patentee is interested in putting the material in there which has very little ability to absorb heat. Now, we can do that either by rubber or by metal, depending upon the volume or weight of those substances used. The important thing is that you don't make that pipe capable of absorbing enough heat to freeze the water as it flows in

(Testimony of William A. Doble)

there, and that is what the patentee is [348] talking about here, and that is what he means by his specific heat.

Q. What you want to do—

A. (Continuing) And he means by low specific heat there that it hasn't the ability to freeze the water when the water flows into the spray-head.

Q. What you are saying is, is it not, Mr. Doble, that unless the water goes through there and doesn't lose its heat content to the extent that it will freeze, you will be able to have a flow of water and it won't be frozen up inside there?

A. That is correct, and that is what the patentee wants to be sure the people using the invention will understand, so that when they use it, it will work.

Q. In other words, that you pass water through there in sufficient volume so that it will have enough heat content so that it will not freeze?

A. You mean by "freeze" the ability of the pipe to withdraw heat from the water, I judge?

Q. Irrespective of any way it might lose its heat.

A. That is correct.

Q. And on page 2, column 2, line 66, it says:

"Like conduit 12, this conduit 17 shall act, when just about to fully drain, to provide a slug or moving piston of leaving water which will draw [349] air after it thru perforations 15 and thru spout 16 in such manner that residual water will be dislodged or removed to an extent that the drain system just described shall not become subsequently clogged by freezing of residual water."

(Testimony of William A. Doble)

Now, does it make any difference as to the speed with which the water goes through there, as to whether this residual water will be taken away, from the size of the pipe? A. The size of the pipe, the conduit?

Q. Yes, the conduit.

A. Well, I don't think it much matters at what speed it goes through. The water will drain out of it, if that answers your question. I don't fully understand that question.

Q. That answers my question. Now, referring to claim 8 it says that the conduits are of such proportionate diameter with respect to length as to cause draining water to finally draw air after it through the corresponding conduit.

There are no figures given in the patent as to that proportion. I mean in the exhibit.

A. Not in the form of dimensions, but the drawings indicate the proportion which the person desiring to use the invention can use.

Q. And that person would know how far he could depart in one way or the other from what is shown in the drawings?

A. I believe he would. I would, and I wouldn't say I [350] am any more competent than most refrigerating engineers, if as competent.

Q. Now, the patent shows an electrically-operated valve, does it not? A. It does.

Q. The Recold unit doesn't use such a valve?

A. Well, I don't know that it doesn't. Those I have seen haven't.

(Testimony of William A. Doble)

Q. I am just asking you what you know.

A. Those I have seen haven't, but the patent only shows one preferred form, and I believe the patent also states that any other form of valve could be used.

Q. Now, in the valve used by Recold, I don't mean the patented valve, I mean the one used by Recold, that you are familiar with,—

A. Yes, I am.

Q. —it is vented to the atmosphere when you turn the handle to the drain position; is that right?

A. It is vented to the atmosphere outside of the refrigerated space?

Q. Yes. A. Yes.

Q. And you have to turn the handle in order to bring that about?

A. Yes, sir, unless it is already in that position. [351]

Q. Yes, exactly. Now, will you turn to claim 10, Mr. Doble. It is mentioned in that claim, in line 4 of the second column,

“said fins, said spray-head and said drip pan respectively co-operating to substantially prevent thermosyphonic flow of air over said coil and fins when the fan is discontinued whereby the air of said refrigerated space does not rise above the freezing point of water during the time required for defrosting said coil and fin surfaces.”

Is there any use of the word “thermosyphonic” in the specification?

A. I have not found that word in the specification.

Q. Is there any statement in the specification as to how the fins and the spray-head and the drip pan shall co-operate to prevent thermosyphonic flow?

A. Not in those words.

(Testimony of William A. Doble)

Q. Yes.

A. But the teaching of the patent is so clear on that and the drawings are so clear that they result—you might say that that word is the summation of the structural advantages, as defined in the specifications and as shown in the drawings.

Q. Are they clear to you? A. Certainly. [352]

Q. You would know about the thermosyphonic flow of air by just looking at the drawings, would you?

A. I certainly would.

Q. Would you know how to build the fins and spray-head and the drip pan to co-operate to prevent this flow of air?

A. I don't believe it would entirely prevent it. I think what the patentee means is that it will reduce it to a very low degree, because wherever you have a differential in heat, you will always have that flow, thermosyphonic flow.

Q. I asked you whether you would know how to so make or place those elements in order to prevent that, from the specification. A. Yes, and the drawings.

Q. How would you know that?

A. By reading the specification and looking at the drawings. It is inherent. You can't help it.

Q. It doesn't tell you about thermosyphonic flow in the specification?

A. It doesn't use that word, but it is only the summation of the operational advantage you get by using the structure as defined in the specification and as shown in the drawings.

(Testimony of William A. Doble)

Q. Well, I must say, Mr. Doble, that it isn't clear to me.

A. Well, I don't see how you could operate in the [353] refrigerating art and not have it clear to you.

Q. Now tell me this: suppose you raised the pan about five inches above the coil. Would that affect the thermosyphonic flow?

A. Which pan do you refer to?

Q. The header. A. The spray-header?

Q. Yes. A. Yes, that would affect it.

Q. Is there anything in the patent about that?

A. Yes.

Q. Does it say not to put it in that position?

A. If you raised it, say five inches, that would only change the syphonic flow very slightly, but the drawings indicate in what portions, or indicate the position of the spray-head in relation to the coils, so you have a clear teaching.

Q. Is there anything in the patent that says how far you can depart from the drawings and not get this result?

A. Well, you can depart from the drawings as long as you get the result of the patent. As soon as you change or you don't get the result, then you no longer use the patent.

Q. There is nothing in the patent that says anything one way or the other about thermosyphonic flow?

A. Yes, by drawings and by description, but not that one [354] word. That is only the summation.

The Court: You said "in the patent."

Mr. Neave: Oh, it is in the patent.

The Court: That is where you got the word from.

(Testimony of William A. Doble)

Mr. Neave: I beg pardon. I mean, in the specification.

The Witness: That is the word to summate the particular thing set forth in the specification and shown in the drawings of the patent, and any refrigerating engineer would certainly understand it.

Q. By Mr. Neave: And they would have understood that prior to 1937?

A. Certainly. That is an old phenomena. But he might not have understood that relationship in this particular combination.

Q. That is your "but"?

A. That is my "but" and I stand by it.

Q. Now, isn't it a fact, Mr. Doble, that none of the claims excepting claim 10, 11 or 13 mention anything about temperatures?

A. Temperatures,—in what respect?

Q. Well, as to whether the refrigerated space is above or below freezing.

A. Yes, they do. I will refer to claim 1. Claim 1 states,

"In combination with a refrigerated space." [355]

Now, to understand what that means, we turn to the first two paragraphs in the patent, appearing on page 1, starting at line 1, reading:

"My invention relates to low temperature refrigeration where a space is required to be constantly maintained at temperatures below the freezing point of water,"—that is very, very definite—"and the invention relates more particularly to methods and devices for defrosting the coils or heat transfer surfaces used in maintaining such conditions."

(Testimony of William A. Doble)

We have got to maintain that sub-freezing condition.

Q. Yes.

A. Now, wait a minute. I haven't finished.

Q. Oh, I am sorry.

A. This is the second paragraph starting in at line 8:

"Where the air which is being recirculated over these low temperature surfaces never rises above the freezing point of water periodic defrosting under maintained low temperature conditions has presented many problems."

And that was his problem, how to meet that condition and solve it, and that is what Mr. McAdam solved. Continuing the reading of that paragraph:

"It is an object of this invention to provide simple [356] and highly effective means for so defrosting."

That definition clearly defines the temperature at which these combinations are to be used, and defines clearly that the refrigerated space is to be maintained at all times below the freezing temperature of water.

Q. So that you are interpreting the term "refrigerated space" in the claim from the specifications?

A. You have to. You always interpret the elements in the claims from the specifications. You know that.

Q. You won't say "Yes" to that?

A. I have no objection to saying "Yes," if you ask a question so that I can say "Yes."

The Court: And so long as you can say "but."

Q. By Mr. Neave: Now, Mr. Doble, apart from that phrase "in combination with a refrigerated space,"—apart from that phrase, taking claim 1, the rest of the claim are elements of an apparatus; isn't that true?

A. Yes.

(Testimony of William A. Doble)

Q. That is the refrigerating apparatus?

A. Yes, but that apparatus has to be used in combination with a refrigerated space. Otherwise, there is no problem.

Q. Yes, all right. Now, suppose that you took the present Recold unit that we have here in the room, and suppose that you operated it in a space that was not below freezing. Would it not be so that all of the elements, the apparatus [357] elements of these claims would be met by that Recold device?

A. Yes, they would, and let me point this out, that I have never seen in the prior art, prior uses, or any of the invention literature, any attempt to use the combination as set forth in this patent in an above-freezing temperature.

The Court: In an above-freezing temperature?

The Witness: In an above-freezing. I haven't seen that combination any place.

The Court: Have you seen it in below-freezing?

The Witness: Yes. That is not prior to this patent. I have seen it since this patent. That taught me. I didn't believe the thing would work either when it was first presented to me.

The Court: You mean you haven't seen the device used in above-freezing rooms?

The Witness: No, I haven't seen it used in above-freezing rooms, or any other.

The Court: You haven't seen it used at all?

The Witness: Yes, in below freezing. But the thing is, it would work very nicely in above-freezing rooms. But that isn't the problem Mr. McAdam had to solve. Mr. McAdam's problem was, "How in the dickens am I

(Testimony of William A. Doble)

going to get the frost from the coils when the darned thing is at below-freezing?" That is the thing the engineers have struggled with. That is the thing the York Company has struggled with. They have [358] tried all kinds of things.

Mr. Neave: I object to what the York Company has struggled with.

The Court: Yes, Mr. Lyons will make the argument.

The Witness: I grant you, your Honor, I have gone too far there.

Q. By Mr. Neave: Now, tell me this, Mr. Doble, it was known, wasn't it, that water would melt ice?

A. Oh, yes, but here is my "but"—but not in a sub-freezing refrigerated space that is maintained at that sub-freezing temperature during the defrosting, during the melting of the ice and snow.

Q. You mean it wasn't known that water would melt ice if the atmosphere were below freezing?

A. Well, I suppose it was known, but it was never applied to solve that problem.

Q. It was never applied in a refrigerator unit, you mean?

A. I won't say that, because sometimes they will take a hose and pour water on a coil, but usually they let the room heat up.

Q. Well, you agree with me, then, don't you, that water will melt the ice even if the atmosphere is below freezing?

A. Yes, Mr. McAdam teaches that. That is the teaching of his patent, how to do it.

(Testimony of William A. Doble)

The Court: How does it happen that we see all the ice [359] on these buildings when they have a fire—of course, not here?

The Witness: Because the temperature, your Honor, is below freezing and the water freezes. That is what everybody thought, that if you used water in a sub-freezing atmosphere the whole thing would freeze to a cake of ice. It was an absurd proposition. If you would take it to an engineer, he would say, "You are crazy." I thought it was crazy, too, when it was first presented to me.

Mr. Neave: The witness is expressing his own views, your Honor, and I move they be stricken out.

The Court: I think so.

Q. By Mr. Neave: Mr. Doble, let's go back again to the use of water for defrosting refrigeration coils. Now, do you know in the literature any device which used water to defrost refrigerator coils where the surrounding air—defrost them with water where the surrounding air was below freezing?

A. I cannot answer that question because it is too indefinite in this respect: by "surrounding air" do you mean the entire unit was surrounded by air?

Q. I mean, the air around the coils themselves.

A. Now, may I have that question read, please?

(The question was read.)

Mr. Lewis Lyon: I think the question had better be reframed, your Honor. [360]

The Court: Do you understand it?

The Witness: It is kind of confusing, your Honor, because he doesn't define his structure well enough to be able to place it.

(Testimony of William A. Doble)

Q. By Mr. Neave: Well, do you know in the literature of any water defrosting of coils where the air surrounding the coils was below freezing temperatures?

A. At the time the water is applied?

Q. At the time the water is applied.

A. And you are using tap water?

Q. That is right.

A. I don't know of any place in the literature where that exact situation is described or would meet that exact definition. It has been practiced in taking a hose into a refrigerated room and melting the ice from the ordinary pipe coils, and probably when they started the atmosphere was below freezing, and when they finished it was probably well above freezing.

Q. Now, what was your experience in regard to refrigeration prior to 1937?

A. I had the good fortune of making a patent on a refrigerating system.

Q. What was your experience in the refrigerating field?

A. My experience was that of most people, of using refrigeration equipment, and I at one time started designing [361] a small refrigerating plant for my own use, because I wasn't satisfied with those on the market. I always felt the old line companies were too slow in adopting the new things, and I was going to design my own job. Then I made an invention in 1931 for a defroster, because I was living in an apartment house and they had a central defrosting system, and about every time I would get the box loaded up nicely, the manager would defrost, and I would have trouble. So I invented an electric system for defrosting that could be operated by

(Testimony of William A. Doble)

the person living in the apartment, so I wouldn't have my box defrosting when I didn't want it defrosting.

Q. That was the only experience that you have had with respect to refrigeration?

A. No. Then in a case I experted down in Phoenix there was a refrigerating problem, and that problem was to pre-cool these refrigerator cars into which they put the fruit, because it was necessary to as rapidly as possible take the field heat out of the fruit, and there were various refrigerating mechanisms used in connection with that.

Q. For whom did you expert that?

A. Mr. Theodore Lassagne of San Francisco.

Q. Whom did he represent?

A. He represented the Phillips' interests.

Q. Wasn't that case after 1937?

A. It might have been, yes. [362]

It was definitely after 1937, but I have been associated with engineering all my life, and there is nothing mysterious about refrigeration. There are a lot of trade tricks, and one of the newest and prettiest wrinkles I have seen is this Recold business.

Mr. Neave: Here we go, your Honor. He is uncontrollable. I may have a few more questions, your Honor, if you are going to recess at 12:00.

The Court: All right. We will recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same day.) [363]

Los Angeles, California; September 19, 1946, 2:00 o'clock P. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor.

The Court: Proceed.

Mr. Neave: No more questions, Mr. Lyon.

The Court: Redirect?

Mr. Lewis Lyon: No redirect, your Honor.

The defendant rests.

Mr. Neave: May it please the court, I would like to offer in evidence as Plaintiff's Exhibit 101 a book of prior patents relied upon. This book contains seven patents, Nos. U. S. 389,098 to Newman, 958,471, to Brassert, No. 1,002,576 to Gayles, No. 1,045,433 to Payne, No. 2,097,-851 to Wenzl, a French patent No. 800,640 to Jensen and Roser, and United States Patent No. 389,652 to Heltzle.

I have an extra copy of this book here if your Honor would like it.

The Court: Thank you.

(The document referred to was passed to the court.)

Mr. Neave: I will give Mr. Lyon one copy because it has some tabs attached to it and I may refer to the tabs.

Your Honor, I would like the court to turn to Tab 2.

Mr. Lyon has brought my attention to the fact that the French patent has the translation and that that translation [364] is incorporated in the book along with the French patent. I gave Mr. Lyon a copy of the translation some three or four days ago and asked him to let me know if there were any differences in his view as to the translation. I haven't heard from him yet about it.

Mr. Lewis Lyon: The translation is acceptable, your Honor. It is a rather flowing translation, but I don't believe it materially changes the meaning of the French patent. If it appears that there are any errors in that translation which we desire to dispute, we will call the court's attention to it, but I don't find them at the present time.

Mr. Neave: It may help your Honor to just look at these patents for a moment. I suggest that you turn to Tab No. 2 first, the patent to Brassert, No. 958,471.

Now in this patent, as he states in the second paragraph, it "relates to the drying of air by refrigerators for metallurgical purposes, as in the well-known Gayley dry blast system."

The first prior use that we will introduce here is of the use of the so-called Gayley dry blast system. In Pittsburgh where air was dried by being cooled to pass into blast furnaces, the dry air apparently has an efficient effect on the production of metal, steel, or whatever it may be, in blast furnaces.

This patent shows the cooling room where the air is [365] cooled. The lines marked 4 are coils and above them you will see spray nozzles 5. Water is sprayed through those nozzles down over the coils to defrost them. The water falls down into the pit 10, is taken from there by the pump 12, and passed into the condenser as a cooling medium and then passes again through pipe 15 to be sprayed down over the coils.

On the first page, the first column, the bottom of the page, line 45, it says:

"In the drawing, I show a building or enclosure 2, containing a series of chambers 3, within each of

which is contained the coils or cooling pipes 4. Above the coils in each chamber one or more spraying nozzles 5 is arranged in such manner that the thawed liquid can be evenly distributed by them over the surface of the coils. Preferably, warm water from the ammonia condensers is supplied, though any supply of water at a temperature above freezing can be used."

The next patent, in Tab 3, is the patent to Gayley, No. 1,002,576. If your Honor will turn to the figure 6 opposite the text of that you will see that this is another of the Gayley system cooling devices. This is an improved chamber showing spray heads, and it is stated, in the third paragraph, the first column, line 20:

"My invention relates to the drying of air by [366] refrigeration in accordance with the well-known system of my prior patents, and is designed to economize in the cost of operation by forcing the air into closer contact with the cooling pipes, and at the same time insure the flowing of the thawing water over the cooling pipes in removing the congealed moisture therefrom."

If you will now turn to Tab 5, the Wentzl patent, No. 2,097,851, and Fig. 1, which is on the first page that you come to as you open up the tab, it shows a cooling device which has finned coils and over them is a spray head which is marked 15 with hole 16.

Fig. 2 shows a cross-sectional view of the spray head 15.

Paragraph 2 of the patent states:

“It is an object of my invention to provide a cooler by which the air in the room, etc., is cooled to a low temperature by an efficient refrigerant, such as brine, or a cooling gas, but in which, notwithstanding the fact that the temperature at the outer surfaces of its cooling elements must never be higher than zero degrees, frosting is kept within such limits as to not give trouble, without uneconomic power demand or oversizing of the cooler.”

Then down further, on line 33, it says:

“At the same time, the air is cooled to a tem- [367]
perature below zero degrees.”

The Court: Where is that?

Mr. Neave: That is line 33, on page 2, the second paragraph. It is a description of the spray pipe.

Now the next patent, Tab 6, is the French patent, and I would suggest that your Honor will turn to the drawing first and then turn to the specifications.

This is a device in which there are coils—

The Court: Where is the drawing?

Mr. Neave: It is at the back of the French patent.

The Court: Yes, I see it.

Mr. Neave: This is a device in which there are refrigerating coils which go up and down on the inside, and right over the top of the coils there is a ring. In Fig. 1 you only see half of it. It is cut in two. That is the spray head.

Fig. 16 out on the right-hand side is the conduit into the spray head.

15 I believe is the similar spray head itself which you can see down in Fig. 2.

Mr. Charles Lyon: 15 is the shell.

Mr. Neave: That may be true. I will check it with the specifications. The whole thing is 16, your Honor.

Now the water is sprayed out and down and is collected in the drip pan at the bottom and the discharge pan 18 and [368] discharged from the pipe 18. At the top is a fan which sucks the air up through the coils and blows the air out of the top.

If your Honor will turn to the third page, or if you wish to look at the drawing I will read from the third page:

“The air of the cooling chamber enters the device in the manner indicated by the arrows. It traverses the passageways and passes through the pipes of the container. The cold created by the refrigerant introduced into the container is transmitted to the air contained in the inside of the device. At the instant that the temperature of the thus-cooled air reaches, for example, -2 degrees C., a thermostat 17, preliminarily set for the desired temperature, makes contact to start the blower which forces the dry, cooled air against the ceiling of the cooling chamber from which the air descends as a properly distributed blanket. The blower keeps the air of the chamber in continuous circulation, which is of advantage in the preservation of foodstuffs.

“Whenever defrosting becomes necessary, such operation may be readily effected either by a current of air obtained from outside the cooling chamber or by means of a circulation of water. The stream of

air or water passes through pipe 16 disposed above the container 2. This pipe is pierced with openings [369] to permit the air or water to flow uniformly through the container and its pipes and into its passages.

"The condensed moisture and the water used for defrosting are collected by the trough 14 and conducted by a siphon pipe 18 outside the cooling chamber without causing the condensed moisture and the water introduced into the device from saturating the air of the cooling chamber.

"Whenever the cooling elements are to be defrosted, the thermostat automatically breaks contact and stops the motor."

I failed to mention that in the preceding patent, the Wenzl patent, it also had a fan, which your Honor probably noticed.

The Court: I noticed it.

Mr. Neave: Now if your Honor will turn back to Tab 1 on the first sheet of drawings is a rather complicated device but it is simply an electrically operated valve for draining pipes against freezing. If we will look at the device at the bottom of the drawing, the pipe at the left of the drawing—I think it is A6; my copy is a little dim—is where the water comes into the valve.

There are two valve seats A4, seats on A5, and A8 which is just to the right of it. While the valve is in its second position seats at A7. [370]

The vertical pipe just above the valve chamber is the service pipe through which the water flows up and also comes down.

When the device is in the position shown the water drains down through the service pipe and out through the

port at the right and through the annular space A9 around a shaft there and out of the valve.

The Court: What valve.

Mr. Neave: In the space A9 I think it is. That is the way it drains out.

Now when the solenoid, the electrical device here is operated, it moves the device to the right closing the port A7 with the valve A8 and opening A4 from A5. That allows the water to come down into the valve and up through the service pipe, the vertical pipe.

The Court: How does it defrost?

Mr. Neave: It has nothing to do with a defrosting device, your Honor. It is just a method of draining pipes in a house against freezing. The whole thing is an automatic device.

The Court: It is a 3-way valve?

Mr. Neave: It is a 3-way valve.

The Court: An automatic 3-way valve?

Mr. Neave: An automatic 3-way valve, just like the one in the patent. [371]

Now Tab 4 is a frost-proof watercloset seat. That is the Payne patent, No. 1,045,433.

Again here is a 3-way valve, which can be seen at the bottom right-hand side of the page. That is placed below ground where it won't freeze. The water comes in from the main through 7. The water comes in and goes up through the pipe 6 and through the pipe 2 and flushes the bowl.

Now in the position shown, the valve is closed. It only operates when somebody sits on the seat so as to let the water go in to flush the bowl. When the weight is removed from the seat then the valve lowers in the position shown and the water drains down through the center.

through 11 and then out through the small ports that you see below 10 and through the pipe 8. That is a 3-way valve to be used to bring water into a zone which is cold, freezing, and then drain everything down as soon as its usefulness is past.

Turn now to Tab 7, and we have a very old patent, the patent of Heltzle, No. 389,652, which is a 3-way valve or stop-and-waste cock.

The patentee says, in the second paragraph:

“My invention relates to improvements in stop and waste cocks, which are placed in cellars of buildings, having the inlet-water pipe connected at one end and water-supply for upper stories [372] connected at the other end; and the object of my improvements is, first to provide means for controlling the water-supply by automatic arrangement between my stop and waste cock and draw cock of sink in upper stories; also, to disconnect the same, as will be explained hereinafter; second, to drain said supply-pipe of water to prevent freezing in cold weather, and, third, to provide ready means in upper stories, by means of which said supply-pipe can be drained of water, obviating the necessity of going to basement or cellar of a building, as usual in the old way.”

Now if your Honor will turn to the drawing I think you can best see by looking at Fig. 3, the center of the sheet. This is the stop-and-waste valve, and it is in the cellar where it won't freeze. Now the water from the main comes in on one side. This valve is in position where the water will flow through. F is the moving valve part.

The horizontal dotted lines show an opening in the valve. If you will look at Fig. 6 below you will see an annular opening, and the water goes through there.

Now when the valve is raised as in Fig. 2, that annular opening is raised up so that it prevents the water from coming through from the main but it will drain back from the right-hand pipe and down through the dotted lines shown at [373] the bottom of the valve there—it looks like an f to me—and down through the spring and out through the hole d at the bottom.

In other words, it is another stop-and-waste valve or 3-way cock.

I do, however, want to call your Honor's attention to the bottom part, the last paragraph of the second column of the specifications of this same patent, where it says:

“It is well known that the water-supply pipes of buildings are more or less placed in exposed places, and that the water contained therein is liable to freeze in the fall and winter season, causing damage by the bursting of the pipes. It is therefore especially desirable, in extreme cold weather, both day and night, that said pipes should be drained at all times and water-supply controlled.”

Mr. Neave: I would like to offer in evidence as Plaintiff's Exhibit 102, pages 181 and 182 of a publication entitled “The Care of a House,” by T. M. Clark, published in 1903.

Reading on page 181:

“It is very often necessary to leave plumbing to itself for long periods, while the house in which it is situated is closed, and special precautions are necessary to protect the fixtures, either from destruction by frost in winter, or from losing by [374] evapora-

tion, in summer, the seal of water in the traps which forms the only barrier against the escape of sewer-air into the rooms.

“When the house is to be left to itself in winter, it is absolutely necessary, in the climate of any part of America north of Florida, or east of the California ranges, to remove water entirely from the supply-pipes. This is done by shutting the main stop-and-waste cock, always placed just inside the cellar wall, usually in a little pit, with a sand bottom, where it will be safer from freezing, and where the water which escapes from the waste-tube will be absorbed by the soil. This water, which often spouts out in copious stream, when the shut-off is closed, comes from the house-pipes, the stop-cock being so arranged that, after communication with the street main is closed, a passage is opened to drain off the water standing in the house-pipes, which could not otherwise be removed, and would freeze if it were left undisturbed. After closing the main shut-off, and draining away such water as will flow through its waste-tube, all the faucets in the house should be opened, not forgetting the sill-cock on the outside of the house, so as to allow the water in the short lengths of pipe leading [375] to them to run out, as well as to admit air, and release the column of water which might otherwise be held in the main vertical pipes by atmospheric pressure; and the cistern-valves supplying the water-closets should be held open, by means of the chain or rod, until all the water in the cisterns has run out through the closet basin.”

Your Honor, we would like to proceed with the introduction of the depositions, and I would like now to know

what procedure your Honor would like to follow in the reading of the depositions.

The Court: I am always trying to find a new way to do it easily and quickly. Maybe you have it.

Mr. Neave: I think they should be read, and I would suggest that Mr. O'Hearn here do the reading to save me doing it.

The Court: Frequently we do it by question and answer, two people reading, one reading as if they were a witness and the other as if he were examining him. I think that the testimony flows a little better that way.

Mr. Neave: We would be very glad to do it that way if your Honor would like to have it.

The Clerk: Are these two exhibits in evidence, your Honor?

The Court: Yes. Admitted. [376]

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 101 and 102 respectively.)

[Note: Plaintiff's Exhibits Nos. 101 and 102 will be found in the Book of Exhibits at pages 1243 and 1295.]

Mr. Neave: I would like to have Mr. O'Hearn follow the file copy, read from the file copy, if he could, because I think that there were some corrections made.

Also your Honor suggested the other day that it might be helpful if we had a list of exhibits which we are going to offer, which we have made up, and I will give you two copies.

(The document referred to was passed to the court.)

Mr. Neave: Perhaps at this point I might save some time by reading into the record a couple of stipulations.

The Court: With respect as to facts?

Mr. Neave: One stipulation is as to the dates—yes, dates of invention of McAdam patent, and the other is as to the use of copies.

The Court: Very well.

Mr. Neave: "It is hereby stipulated for the purposes of this cause of action by and between plaintiff and defendant thereto, through their respective attorneys, that the date of conception of the McAdam Patent No. 2,219,393 upon which defendant will rely is during the month of September, 1937, and that the date of actual reduction to practice of the invention of the said McAdam patent upon which defendant relies is during the month of October, 1937."

The second stipulation, your Honor, is as follows: [377] "It is hereby stipulated by and between the parties hereto, by their counsel, that uncertified printed or photostatic copies of any United States or foreign patents, and photostats or photographs of any publication, letter or other document, may be received in evidence with the same force and effect as the originals; that the date of application and patenting printed upon any patent, and the date of publication appearing upon any publication shall be taken to be the actual date of application, patenting or publication as the case may be, subject to correction if error should appear."

Those are both stipulated to, are they not, Mr. Lyon?

Mr. Lewis Lyon: That is correct.

The Court: Very well.

Mr. Neave: We have an exhibit, your Honor, which is not in that book and perhaps we could put it on the desk next to you. It is a physical exhibit.

The Court: Is anybody going to testify about it?

Mr. Neave: The depositions are.

The Court: Let us put it over here on this corner then.

Mr. Neave: I believe in transit there has been a piece that has been knocked off. It will be produced in a minute and your Honor will be able to see where it is supposed to go.

This piece here is meant to fit on the top, and this is supposed to go like this. (Illustrating) With your Honor's permission and with counsel's permission, we will put it back [378] on.

The Court: Will the first deposition deal with that?

Mr. Neave: Yes, your Honor, the first series of depositions.

We are going to start the depositions, your Honor, in the order in which they were originally taken, and that is the order in which the exhibit numbers run.

Does your Honor want me to take the lectern or may I sit here?

The Court: I think you had better take the lectern.

Mr. Neave: May it please the court, this deposition starts with a stipulation, which I shall read.

The Court: Is it just the usual stipulation?

Mr. Neave: Yes, it is, about the taking of the testimony, and so forth.

The Court: Is it necessary to read that? Why not just let the reporter copy it in so we can get on?

Mr. Neave: That is all right with me.

Mr. Lewis Lyon: Your Honor, it was suggested that we have had these transcribed once. Do we need them transcribed all over again?

The Court: I do not think that it makes any particular difference as long as you stay with the text of them. Some portions of them will probably be objected to.

Mr. Lewis Lyon: That is right. He might as well take [379] down.

The Court: The difficulty there is that when the record goes up on appeal, as all patent cases do, it makes a bad record on appeal.

Mr. Neave: Is it all right, Mr. Lyon, that the stipulation be copied by the reporter and not read?

Mr. Lewis Lyon: Certainly. [380]

In the District Court of the United States

Southern District of California

Central Division

Civil No. 4166-PH

York Corporation, Plaintiff, vs. Refrigeration Engineering, Inc., Defendant.

Depositions taken on behalf of plaintiff, York Corporation, at the offices of Brown, Critchlow & Flick, 1706 First National Bank Building, Pittsburgh, Pennsylvania, pursuant to the attached notices, before Gertrude E. Ryan, Notary Public, starting at 10:00 A. M., Friday, February 9, 1945.

Appearances: For Plaintiff: Alexander C. Neave, Esq. William O'Hearn, Esq.

For Defendant: Lewis E. Lyon. Esq.

It is stipulated by and between the parties by their counsel:

1. That the hearing today is held pursuant to notices served upon the defendant and now before the Notary, Miss Gertrude E. Ryan.

2. That the provisions of Rule 26 (a) of the Federal Rules of Civil Procedure that depositions taken prior to

services of answer shall be by leave of the court, is hereby waived. [381]

3. That the witnesses shall be sworn by Miss Ryan, who is fully qualified under the provision of Rules 28, sections (a) and (b) of the aforementioned Rules.

4. That the testimony given here shall be taken stenographically and transcribed by Miss Ryan.

5. That the testimony, when transcribed, shall be submitted to the witness for examination and shall be read to or by him, and any changes in form or substance which the witness desires to make shall be entered upon the deposition by Miss Ryan, with a statement of the reasons given by the witness for making them.

6. That the signing of the depositions as read and corrected by the witness is hereby waived.

7. That Miss Ryan, after duly certifying the depositions, shall send them by registered mail to the Clerk of the District Court of the United States, Southern District of California, Central Division, for filing.

8. That the cost of the original transcript, exhibits, attendance fees and notary's fees shall be borne in the first instance by plaintiff, but shall be eventually charged as taxable costs to the losing party.

FRANK C. BAUER

called as a witness on behalf of plaintiff, having been first duly sworn by Gertrude E. Ryan, Notary Public, testified as follows: [382]

Direct Examination

By Mr. Neave:

DQ1. Will you please state your name and address?

A. F. C. Bauer—Frank C. Bauer, 1997 Perrysville Avenue, Pittsburgh, Pennsylvania.

(Deposition of Frank C. Bauer)

DQ2. What is your present occupation, Mr. Bauer?

A. Chief Engineer, Isabella Furnaces, Etna, Pennsylvania.

DQ3. The Isabella Furnaces of what company?

A. Carnegie-Illinois Steel Corporation.

DQ4. How long have you been with that corporation?

A. Isabella Furnaces, let me see. I started there in December, 1923. Previous to that I worked for the old Carnegie Steel Company.

DQ5. Are you in charge of the engineering records at the Isabella Furnaces? A. Yes.

DQ6. Do these records include original tracings of drawings and original correspondence pertaining to the Isabella Furnaces? A. Yes.

DQ7. And are those records under your direct custody and control?

A. Yes. That is all the records are not under my charge—that is just the engineering records. [383]

DQ8. Mr. Bauer, I show you a blue print which is marked in the lower righthand corner, "Carnegie Steel Company, Isabella Furnaces, Dry Blast Plant, No. 940" and with the date on here "June 2, 1906." I ask you whether you can produce from your files or files under your custody the original tracing of this blue print.

A. Here it is.

DQ9. Would you be good enough to compare the blue print and the original tracing and tell me whether or not the blue print is a blue print and exact copy of the original tracing?

A. This print is an exact copy, a blue print of this tracing from our files.

(Deposition of Frank C. Bauer)

Mr. Neave: Will you please mark the blue print No. 940 as Plaintiff's Exhibit No. 1?

Mr. Neave: May I state, your Honor, that these are the Pittsburgh depositions?

The Court: These exhibits that I have are called Yamhill depositions.

Mr. Neave: I am sorry.

The Court: Have you a quicker way to do it?

Mr. Lewis Lyon: I have heard cases where it has been deemed to have been read subject to the ruling on any objections contained therein by the court without spending all the time reading it. It is nearly 600 pages. Our average of pages of testimony is 150 pages a day. We can spend better [384] than four days reading these depositions.

Mr. Neave: I think we can, your Honor, but on the other hand they have got to be read some time and considered by you.

The Court: The difficulty with taking and reading them when I have time is that as soon as I get off the bench in this case I am crowded with a lot of other matters and by the time I get around to reading your depositions I probably will have OPA cases, conscientious objector cases, and heaven's knows what in my mind, and I would rather take an extra day or two.

Mr. Lewis Lyon: That is all right with me, your Honor.

The Court: If it isn't too much burden on counsel.

Mr. Neave: No, that is all right.

The Court: Usually the lawyers who have the depositions to offer prefer to read them and then they know they are read.

(Deposition of Frank C. Bauer)

Mr. Neave: I have no doubt about that, your Honor.

The Court: Well, I think we might as well proceed.

By Mr. Neave;

DQ10. I show you photostats of three letters—

Mr. Lewis Lyon: What about the exhibit?

Mr. Neave: The exhibit has already been marked in the deposition. I don't know what your practice is here.

The Court: What I would suggest for time saving on these [385] is that you complete your deposition, let them be marked, and at the conclusion of the deposition offer all the exhibits in evidence.

Mr. Neave: Yes.

The Court: That will save time, rather than offering them as we go along.

Mr. Neave: Very well.

DQ10. I show you photostats of three letters, written on the letterhead of Carnegie Steel Company, all of them addressed, "Dear Bruce" and signed "Bob," one letter being dated July 22, 1906, the second letter being dated July 23, 1906, and the third letter being dated July 24, 1906. There is also a fourth letter similarly addressed and signed, dated July 25, 1906. I show you these letters and ask you whether you have had, in the records of the company and under your custody, the original letters from which these photostats were made and, if so, whether you can produce them.

A. The first letter is an exact copy of the letter from our files.

DQ11. What date?

A. July 22, 1906. That consists of three pages. It is addressed as "Dear Bruce." That is likely Bruce Walter who was chief engineer in charge of this dry blast plant

(Deposition of Frank C. Bauer)

at that time. And the signature "Bob" was probably Bob Taylor.

DQ12. Are there three pages to this letter of July 22? [386] A. Three pages; that completes that one.

DQ13. What about the letter of July 23? Before you go to the letter of July 23, let's go back for a moment to the letter of July 22, Mr. Bauer. Would you look at the original letter of July 22nd and see whether you were correct in stating that it consists of three pages rather than two?

A. I would say that third page applies to the letter. He says, "He will have to give her another 2 per cent today or tomorrow."

"Think about this." In other words, he is referring to a furnace.

DQ14. Now we are on the letter of July 23.

A. July 23, I have the one sheet. I am looking for the other sheet. This is it. That doesn't seem to be the continuation of that letter.

DQ15. Mr. Bauer, would you look at what you said was the third sheet of the letter of July 22nd and see whether that is the second sheet of the letter of July 23?

A. That would fit on there but I can't say positively that that would be the second sheet of this letter.

DQ16. That is the letter of July 23?

A. That is right. Pity they don't put a date on the second sheet.

DQ17. Can you identify the first sheet of the letter of July 23rd with the original in your possession?

A. Yes. The first sheet is a photostat of a letter [387] from our files, dated July 23.

(Deposition of Frank C. Bauer)

Mr Lyon: The three sheets of the letter should be marked for identification in some manner.

Mr. Neave: I think you are right that it should be straightened out for the purpose of the record.

DQ18. Mr. Bauer, would you look at the three pages of the letter of July 22, 1906, that you referred to a minute ago? Now, these three sheets you referred to a minute ago, the first sheet is the first sheet of the letter with the date July 22, 1906?

A. That is correct. It is marked 2 p. m.

Mr. Neave: Let us have that marked as Plaintiff's Exhibit No. 2-A.

DQ19. And the second sheet you referred to begins with the word, "Started." Is that correct?

A. That is right.

Mr. Neave: I ask that the Notary mark that as Plaintiff's Exhibit No. 2-B.

DQ20. Now, the third sheet that you referred to is one which starts, "Think about this." Is that correct?

A. That is right.

DQ21. I refer you now for a moment to the letter dated July 23, 1906, the first page of which starts, "Dear Bruce" with the date on it. Is that correct?

A. That is correct. [388]

DQ22. Referring to the sheet of the letter which starts, "Think about this," I want to know whether you believe this to be the second sheet of the letter of July 23, 1906.

Mr. Lyon: I will have to object to that as being leading and as already having been asked and answered several times.

(Deposition of Frank C. Bauer)

The Court: Objection sustained.

Mr. Neave: I ask that the Notary mark the page which starts, "Think about this" as Plaintiff's Exhibit No. 3.

Mr. Lyon: You are merely asking that these be marked for identification at the present time. You are not offering them as exhibits?

Mr. Neave: No.

Mr. Lyon: That is true in all these cases?

Mr. Neave: That is true in all these cases.

DQ23. Are you pointing to Plaintiff's Exhibit No. 2-B and Plaintiff's Exhibit No. 3?

A. Comparing the writing, I would say that this third sheet applies to the letter of July 23, 1906, but I can't say positively, just comparing the writing.

DQ24. You believe Plaintiff's Exhibit No. 3 applies to the letter of July 23, the first sheet of the letter of July 23?

A. That is right but I can't say positively because the third sheet does fit on either of these letters.

Mr. Neave: I ask the Notary to mark the sheet of July 23, [389] 1906, as Plaintiff's Exhibit No. 4.

DQ25. I show you letter dated July 24, 1906, and ask you whether you can identify that from the original in your files.

A. Yes. This letter dated July 24, 1906, is an exact copy of letter from our files.

Mr. Neave: I ask that the letter of July 24, 1906, be marked Plaintiff's Exhibit No. 5.

Mr. Lyon: How many sheets is that composed of?

Mr. Neave: One sheet.

(Deposition of Frank C. Bauer)

DQ26. I show you a letter dated July 25, 1906, already referred to, consisting of two sheets and ask you whether this is an exact copy of a letter from your files.

A. Yes. This letter dated July 25, 1906, is an exact copy of the letter in our files, dated July 25, two sheets.

Mr. Neave: I ask that the letter of July 25, 1906, be marked Plaintiff's Exhibits No. 6-A and No. 6-B.

DQ27. Have you in the files of your company any blue prints of the Dry Blast Plant at the Northwestern Iron Company at Mayville, Wisconsin?

A. Yes.

DQ28. Would you produce such blue prints as you have?

A. Here are the prints, three of them. These are the three prints from our files.

DQ29. Will you identify them by legend that there may be on the prints?

A. Well, we never marked these prints. [390]

DQ30. I just want to have some means of identification as to what the prints are.

A. This is the Dry Blast Plant of the Northwestern Iron Company and they were probably made by Robert C. Taylor. His name is on the prints. That is the man referred to as "Bob" in the letters.

DQ31. Is that drawing to which you are referring marked "General Arrangement of Brine Piping Refrigerator Chamber No. 10?"

A. That is right.—

Mr. Neave: I ask that this drawing be marked as Plaintiff's Exhibit No. 7.

A. —Just a minute, do you want copies of these prints?

(Deposition of Frank C. Bauer)

DQ32. Yes. What is the next?

A. The second print is Dry Blast Plant, Northwestern Iron Company, General Arrangement of Water Piping, Thawing and Ammonia Condenser No. 13.

Mr. Neave: I ask that the Notary mark the print referred to by the witness as Plaintiff's Exhibit No. 8.

DQ33. What is the third blue print?

A. The third print Dry Blast Plant, Northwestern Iron Company, General Elevation showing water piping, No. 14 dated September 9, 1908.

Mr. Neave: I asked that this print be marked Plaintiff's Exhibit No. 9. [391]

Mr. Bauer, I will turn over to you plaintiff's Exhibits No. 7, No. 8 and No. 9 and will very much appreciate it if you can let us have three photostats of each of these prints to be made at our expense.

DQ34. Did you come to this hearing pursuant to a subpoena? A. Yes.

Cross Examination

By Mr. Lyon:

CQ1. Mr. Bauer, did you say that you were in the employ of the Northwestern Iron Company at any time?

A. No.

CQ2. Did you say that you were in the employ of the Carnegie Steel Company, Isabella Furnaces, in June, 1906?

A. No. Well, let me see. Yes, I was in the employ of the Carnegie Steel Company but not at Isabella Furnaces.

CQ3. During June, 1906?

A. Yes, I was employed by the Carnegie Steel Company in 1906.

(Deposition of Frank C. Bauer)

CQ4. Where? A. In the city office.

CQ5. You weren't connected with the Isabella Furnaces at that time? A. No.

CQ6. How long was it after that before you became identified with the Isabella Furnaces? [392]

A. I started at Isabella Furnaces in December, 1923.

CQ7. And when were you first assigned the control of the files or when was it that the files were first placed under your supervision from which you have collected this matter including the plaintiff's Exhibits No. 1 to No. 9 inclusive? A. That was January 1, 1937.

CQ8. Prior to that date, you had had no control of these files, had you?

A. No. They were always in charge of the chief engineer.

CQ9. All that you know about these particular papers which you have produced here, Plaintiff's Exhibits No. 1 to No. 9, is that they are papers that you recently took from these files which are now under your supervision. Is that correct? A. Yes.

CQ10. Under whose direction and at whose request did you withdraw these papers?

A. Mr. McCarthy of the—I forget the name of that firm; this gentleman here, Mr. O'Hearn, and Mr. McCarthy. I understand that they were cleared through the city office. We were instructed to give them any information that they wanted in connection with dry blast.

CQ11. Mr. McCarthy being, as you understood it, a paid investigator. Is that correct? [393] A. Yes.

CQ12. Prior to the time when you were requested to withdraw these instruments from these files, had you, at

(Deposition of Frank C. Bauer)

any time before that, seen these particular letters or blue prints?

A. Not the letters. Those files have been in the vaults for years. We have had no occasion to look them up. But this particular blue print, this No. 940, while I had no occasion to use that, I have been through these tracing files many times and this drawing, while I could not say positively that I saw it in the files, yet I am certain it was there.

CQ13. You had no particular occasion to refer to it specifically until you were called upon to produce it. Is that correct? A. That is.

CQ14. And you don't recall having referred to it specifically for any information until you were called upon to produce it here? A. That is right.

CQ15. When you were called upon to produce these records, did you personally withdraw them from the file or request someone else to do it?

A. I had the file girl get the records out. The entire record was brought out into the drafting room and Mr. O'Hearn [394] and Mr. McCarthy went through it and picked out the items that they wanted. Then I had them cleared through the city office, photostats were made, were mailed directly to you gentlemen in New York, I believe.

Redirect Examination

By Mr. Neave:

RDQ1. You have no reason to suppose that Plaintiff's Exhibits No. 1 to No. 9 have not been in the regular files of the company ever since they were first placed in them, have you? A. No.

RDQ2. You believe that they have been kept regularly in those files? A. Yes.

Mr. Neave: It is stipulated that when photostats of Plaintiff's Exhibits No. 7 No. 8, and No. 9 have been obtained by Mr. Bauer one copy of each will be sent to the Notary, Miss Ryan, who will place them and keep them with the other Exhibits.

The next deposition is still on the same prior use at Pittsburgh, and is the deposition of Mr. Kernan.

A. RAPHAEL KERNAN

called as a witness on behalf of plaintiff, having been first duly sworn by Gertrude E. Ryan, Notary Public, testified as follows: [395]

Direct Examination

By Mr. Neave:

DQ1. What is your full name?

A. A. Raphael Kernan.

DQ2. And your residence address?

A. 220 Emerson Avenue, Aspinwall, Pennsylvania.

DQ3. What is your present occupation?

A. Superintendent of Industrial Relations, Isabella Furnaces, Carnegie-Illinois Steel Corporation.

DQ4. At Etna, Pennsylvania? A. Yes.

DQ5. How long have you been employed by the Carnegie-Illinois Steel Corporation?

A. September, 1909.

DQ6. At that time, was the company the Carnegie Steel Company or the Carnegie-Illinois Steel Corporation?

A. Carnegie Steel Company at that time.

DQ7. Are you in charge of the employment records of the employees of the Carnegie Steel Company or its successor, the Carnegie-Illinois Steel Corporation?

A. I am.

(Deposition of A. Raphael Kernan)

DQ8. Have you examined these records to determine the period of employment of the following persons: Jesse Brandt, Edward Kennedy, William Swope, Edward Har-kins and Harry Haney? [396]

A. I have examined those records.

DQ9. Can you give me the period during which Jesse Brandt was employed by the company?

A. I can. Jesse Brandt was employed originally at Isabella Furnaces on 5-20-02, the fifth month, twentieth day of 1902.

DQ10. Is he still employed by the company?

A. He is at present employed at Isabella Furnaces.

DQ11. Has he been so employed from that time to the present time?

A. There have been certain periods during slack operations when he was not employed but generally he was considered a permanent employee.

DQ12. Can you give me the exact dates of employment from your records?

A. I can. 5-20-02 until 31-1-08; 11-24-09 to 12-21-08, he was then at Lucy Furnaces which was a sister plant of the Isabella Furnaces; 12-22-08 to 12-8-1910, he was at Isabella; from 1-18-11 to 2-15-11, he was at Lucy Furnaces; from 2-17-11 until 4-26-11, he was at Isabella Furnaces; from 8-16-11 until 2-14-15, he was at Isabella Furnaces; from 5-16-15 until 5-14-21, at Isabella Furnaces; from 9-29-21 until 8-20-27, at Isabella Furnaces; from 3-13-28 until the present, he has been continuously employed. [397]

(Deposition of A. Raphael Kernan)

DQ13. Can you give me the employment information on Edward Kennedy?

A. Edward Kennedy was employed at Isabella Furnaces on 7-24-03 and he was there until 12-4-1915.

DQ14. How about William Swope?

A. William Swope was employed in February 1904, and he worked until August 1905. He was then re-employed in October, 1906, and he was employed until May 1908.

DQ15. Have you the employment information on Edward Harkins?

A. Edward Harkins was employed December, 1904, and he left there in December, 1905. He was re-employed in the ninth month, first day of 1906, and he was employed until the eleventh month, thirteenth day, 1906. He was employed from the ninth month of 1907 until the eleventh month, thirtieth day, 1907. He was re-employed on the first day of January, 1909, and he was employed until the sixth month, first day, 1910. He was then re-employed on February 1, 1913, until March 26, 1917.

DQ16. Can you give me the dates when Harry Haney was employed by your company?

A. Harry Haney was employed in July, 1906, until November, 1907. Then he was re-employed on the fifth month, first day of 1908. He continued until the seventh month, thirtieth day of 1908. He was re-employed on the [398] first day of the first month of 1909 and was with us until the fourth month, twenty-second day, 1911.

DQ17. Did you ever know Robert Taylor?

A. Yes, sir.

(Deposition of A. Raphael Kernan)

DQ18. What was his position with the company?

A. He had had several positions with the company. When I first knew him, he was an engineer at Isabella Furnaces. He later became superintendent of the Lucy Furnaces, and after that was transferred to the Isabella Furnaces as superintendent.

DQ19. Do you recall when he was superintendent of the Isabella Furnaces? A. Pardon me?

DQ20. Do you recall when he was superintendent of the Isabella Furnaces?

A. Yes. You mean the dates?

DQ21. Yes, approximately.

A. He was superintendent of the Isabella Furnaces in, I think he finished up in 1935 or 1936, or thereabouts. He had been superintendent from about 1932 to 1935 or 1936. I don't recall the exact date.

DQ22. Previous to that time, do you know whether Mr. Taylor did any work on the Dry Blast Plant at Isabella Furnaces?

A. Not from my personal knowledge. I understood he [399] had.

DQ23. You came to the company in 1909?

A. 1909, yes.

Cross Examination

By Mr. Lyon:

CQ1. You have no employment record for Robert Taylor similar to the employment records you have read for the other individuals?

A. We have them available. I have not taken off a transcript.

(Deposition of A. Raphael Kernan)

CQ2. What you have taken off and brought here is a transcript or list of the dates of employment. Is that correct? A. That is correct.

CQ3. You haven't the records of employment themselves here? A. That is right.

CQ4. When were you placed in charge of these records? A. August 1, 1936.

CQ5. Prior to that time, had you anything to do with those records? A. No, sir.

CQ6. Are these records that are now under your exclusive control? A. They are. [400]

Redirect Examination

By Mr. Neave:

RDQ1. Do you know whether Mr. Taylor is still alive? A. Mr. Taylor is dead. [401]

JESSE O. BRANDT,

called as a witness on behalf of the plaintiff, having been first duly sworn by Gertrude E. Ryan, Notary Public, testified as follows:

Direct Examination

Mr. Neave:

DQ1. What is your full name?

A. Jesse Oscar Brandt.

DQ2. Your residence?

A. 809 High Street, Sharpsburg, Pennsylvania.

DQ3. Where are you presently employed?

A. Carnegie-Illinois Steel Corporation, Isabella Furnaces, Etna.

DQ4. I understand and I want you to tell me whether this is correct, that you have been employed by Carnegie

(Deposition of Jesse O. Brandt)

Steel Company or Carnegie-Illinois Steel Corporation since May, 1902, except for certain short periods of time. Is that correct?

A. I have been. If the plant was shut down in that period, we laid off at the time.

DQ5. Will you tell me what your work was with the company from 1905 on?

A. In 1905, I was in the blowing room, as well as I can remember, for two years, and from the blowing room to the power house for a number of years.

DQ6. Did you ever work in the Dry Blast Plant? [402] A. I did.

DQ7. When did you work there?

A. In 1909, I went in there as operator.

DQ8. Were you ever engineer in the plant?

A. I was engineer, yes, sir.

DQ9. At that time? A. Yes.

DQ10. Whom did you succeed?

A. William Swope.

DQ11. How long did you continue to be in the Dry Blast Plant?

A. Until they done away with it—dismantled it.

DQ12. Do you recall when that was?

A. As close as I remember around about 1921. We made ice after we discontinued the dry blast business. We still made ice. We ran one part of the engine.

DQ13. As part of the dry blast plant, it was discarded in 1921? A. Yes.

DQ14. Would you tell me what a Dry Blast Plant is?

A. It is a plant to take the moisture out of the air; used to dry air for blast furnaces. It consists of ammonia compressors and coil room—what we called the coil room

(Deposition of Jesse O. Brandt)

—Dry Blast Room they called it—and coolers, three brine coolers, two brine pumps, one water pump, 10-inch water pump, [403] one 16-inch fan, and I just mentioned condenser on top; Brine pumps (You got them down?), water pumps, 14 or 16 foot fan to blow air through, to pump atmosphere in from the outside to this Dry Blast Room.

DQ15. Would you describe to me the general operation of the Dry Blast Plant in 1909 and thereafter while you were engineer in charge of the plant?

A. General operation of it?

DQ16. Yes.

A. Well, I will start from the coil room. The object in the coil room was to keep the temperature down below freezing.

DQ17. These coils you are talking about, what kind of coils were they?

A. Two inch pipe coils. Circulating brine through them. This 16 foot fan blows up through the shaft up into the compartments and freezes the moisture out of the air.

DQ18. What did the brine do?

A. It would freeze the coils and make the air cold for blowing.

DQ19. Where did the air go?

A. Blowing engines pumped it out from a manifold on the top of the dry blast building.

DQ20. Where did the air go?

A. Into the blast furnaces. [404]

DQ21. Let us think about the refrigerator room for a moment. Was it all one big room or was it divided?

A. In my time, it was four compartments.

(Deposition of Jesse O. Brandt)

DQ22. Were there any entrances or exits to the compartments? A. There was one entrance.

DQ23. Where was that?

A. Between the engine room and cooling room.

DQ24. How did the air get into these compartments?

A. This fan drove it through there.

DQ25. Where did it come in, at the top or bottom?

A. Bottom. Into the bottom and out of the top.

DQ26. What was the purpose of having four compartments?

A. Well, the purpose of four compartments was when they defrosted one they would shut it off separate and have three operating.

DQ27. What was it that was defrosted?

A. The 2 inch pipes.

DQ28. The brine pipes? A. The brine pipes.

DQ29. They got covered with ice? A. Yes.

DQ30. How was the ice defrosted?

A. With cold water spray, sprayed over the top of each coil. Each coil had a separate spray.

DQ31. And the spray came from some pipes over the brine [405] coils?

A. Yes, from the header pipe.

DQ32. Where did the water come from that was used to spray these brine pipes?

A. It came from this ammonia compressor tank—condenser upstairs, supply tank—and rapidly flowed down into this header.

DQ33. What was the water doing on the condenser?

A. It liquefied the condenser—the ammonia.

DQ34. That is, water was brought down from the condenser pipes? A. Yes, sir.

(Deposition of Jesse O. Brandt)

DQ35. Where was that water collected?

A. In a pan.

DQ36. Underneath the condenser coils?

A. How do you mean?

DQ37. Was the pan underneath the condenser coils?

A. Yes.

DQ38. Then where did the water go from that pan?

A. We used some in a steam condenser on one end of the tank. What it did not take, we had an over-flow in the same tank and ran it in the sewer into the river.

DQ39. You mentioned a minute ago that water from the pan under the condenser went over to be used to defrost the brine pipes. [406] A. Yes, sir.

DQ40. Would you kindly trace in a general description the pipes that went from the pan over to the refrigerator building?

A. It came down, a 6 inch line came down, went into the tank, runs out along this dry blast building.

DQ41. Dry blast building?

A. Cooling building. Four headers, 4 branches up into each section of the cooling room.

DQ42. Is this header, this line you are speaking of outdoors?

A. Yes, between the power house building and cooling building. The feed line is in the engine room. Comes from a tank. The rest of the four headers were outside.

DQ43. How does the water get to the water sprays above the brine coils inside of the refrigerating building?

A. By gravity. Open the feed line in the engine room and one outside and gravity shoves it up there.

(Deposition of Jesse O. Brandt)

DQ44. So that the headers go up into the refrigerating room? A. Yes, sir, the feed lines.

DQ45. Now, how did you turn the water on when you wanted to defrost?

A. It was not my job to do that.

DQ46. Tell me first, as engineer of the Dry Blast Plant, were [407] you in charge of defrosting?

A. Yes, in charge of it, but I did not do it.

DQ47. Do you know how it was done?

A. I do, yes.

DQ48. Will you tell me?

A. You want the operation from start to finish?

DQ49. Yes.

A. The man in a vestibule, goes down into the cellar.

DQ50. In a refrigerating building?

A. In the refrigerating building, down into a 7 foot high cellar. He shuts the feed valve, brine feed valve which feeds these coils. Then he opens up his drain valve and it runs into a supply tank in the cellar. When it comes out of this one section of coils, then he shuts off one of the solid doors from the fan on that section.

DQ51. That is, the section that is being defrosted?

A. Yes.

DQ52. You defrost only one section at a time?

A. One a day. He shuts a solid door. He goes then into the refrigerating building, shuts 2 trap doors on the air manifold. That is to keep the water defrosted from going into the—sucking the water into the other compartments. Two trap doors on there. Then by the time he has done that his lines are about half empty and he goes down into the engine [408] room where they have a small brine pump. This brine pump takes this brine that

(Deposition of Jesse O. Brandt)

is emptied out of these coils, pumps it on the roof in a dead supply tank—suction tank we called it. Then he goes out on this outside business from the engine room, outside of the refrigerator room, opens his feed valve outside.

DQ53. Opens the feed valve for what?

A. For defrosting.

DQ54. For the water line? A. Yes.

DQ55. That lets water into the header?

A. Not yet. Then he goes on a little catwalk, then into the engine room, and opens the feed valve.

DQ56. Inside the engine room?

A. Inside the engine room. Water valve inside the engine room. That water valve in the engine room feeds this line in this section he is defrosting. That is all the operation he has to do until he has shut his down flow off. He goes in, looks at his coils a few times to see how they are and then he is done with that until they are done defrosting.

DQ57. How long did it take to defrost?

A. It all depended on the weather. How long that section would take depended on the weather naturally, around about $1\frac{1}{2}$ hours in the Summer to $1\frac{3}{4}$ hours. In the winter it would take a little longer naturally. [409]

DQ58. How cold was it in the defrosting room before the defrosting?

A. It was our duty to keep that below freezing all the time.

DQ59. That is, in the refrigerating room?

A. Yes, sir.

(Deposition of Jesse O. Brandt)

DQ60. During the defrosting period, how cool was it in the refrigerating compartment that was being defrosted?

A. That is something we never took any record of. The other compartments would be below freezing.

DQ61. After the compartment had been defrosted, what was the practice?

A. You mean the coil tender?

DQ62. Yes.

A. He would just re-trace his steps and refill that section again. Do you want me to say how it was done?

DQ63. Yes.

A. He would be in the engine room. He would go up this ladder in the engine room, shut his main water valve off. He would walk out on the platform, shut his other valve off—water valve.

DQ64. Where was that second water valve?

A. Outside of the building.

DQ65. On what pipe line?

A. On the section he was defrosting naturally. Then [410] there is a drain valve, 1 inch drain valve he would open.

DQ66 Where was that?

A. Outside on the water line right above the 6 inch gate valves, above the top gate valve. Now he would go down the outside in the engine room, on the ladder, would go in the freezing room, change his valves in there and let his brine fill up, let his brine fill up in there, open his doors in the top, open his solid doors in the cellar, and he was ready for use of that section again.

(Deposition of Jesse O. Brandt)

DQ67. What was the purpose of opening the doors?

A. Let the air back in that compartment he defrosted. Let it in and let it out on the top.

DQ68. What was the temperature of the water that was used for defrosting?

A. I would say average temperature would be about 50 or 55 degrees.

DQ69. Where did that water come from that was used?

A. We would pump it out our own pumping station, from the river, pump it up in our supply tank lines running all through—running from the bottom of our plant under ground to different departments of the plant, just like a city water line.

DQ70. I show you Plaintiff's Exhibit No. 1 and ask you if you recognize it.

A. I do. There is one difference here. [411]

DQ71. Referring to Plaintiff's Exhibit #1, on the left hand side of the sheet we have a figure, what does that represent?

A. That is the freezing room.

DQ72. At the Dry Blast Plant of the Isabella Furnaces?

A. Isabella Furnaces, yes, sir.

DQ73. In the center of the figure, I see a lot of snaky lines. What are those?

A. Those coils.

DQ74. Those are the brine coils?

A. Brine coils.

DQ75. Cooling coils?

A. Yes, sir.

DQ76. On the left of that left hand figure, there is a round pipe which is marked 6 inch water main. What was that water main?

A. That was for defrosting your cooling coils.

(Deposition of Jesse O. Brandt)

DQ77. Where did that water main come from?

A. Main supply came from the engine room condenser tank. We called it a tank. It was a pan under the condenser.

DQ78. That was quite a large tank?

A. Yes, sir.

DQ79. How big?

A. Eighty feet long and 18 feet wide and $1\frac{1}{2}$ or 2 feet deep. [412]

DQ80. I see a pipe extending vertically and this is marked 6 inch pipe. What was that pipe?

A. That went up into the building to feed your thawing off, to feed water into your coils for defrosting.

DQ81. How many such pipes were there that went up into the refrigerating room? A. Four.

DQ82. Four pipes led off this main?

A. Yes, 4.

DQ83. Why were there 4?

A. One for each compartment, 4 compartments.

DQ84. Now, is there anything shown on this drawing of how the water comes up over the brine coils?

A. How it comes up there?

DQ85. Yes.

A. It comes down through the tank into this supply line here; gravity forces, shoves it over the top into a header on that one section in through a spray or perforated pipe. That is the way.

DQ86. What is the size of the perforated spray pipe?

A. One and one-half inch.

(Deposition of Jesse O. Brandt)

DQ87. Now as we have seen the pipe layout on this drawing, does that represent the way the pipe layout was when you were there in 1909?

A. The water pipe drawing? [413]

DQ88. Yes. A. Yes.

DQ89. I see here on the vertical piping on the left hand side of the left hand figure the writing says, "1 inch drain valve", which is just above the 6 inch gate valve. Was there such a drain valve on each of the four pipes going up into the refrigerating room?

A. Yes. Four, one on each.

DQ90. What was the purpose of that drain valve?

A. For draining water out of your feed line for defrosting.

DQ91. Was there any other drain valve on this water pipe?

A. Yes, sir, one out on the end of the feed line, horizontal line, one on the end of the line.

Mr. Lyon: Which end?

A. Dead end of the line. A blind head with a 1 inch valve put on it.

DQ92. When you are talking about the line, do you mean the headerpipe line running on the outside of the refrigerating building from which the four pipes extended vertically into the refrigerating building?

A. Yes, sir. On the end of that line, a 1 inch valve.

DQ93. When the water was brought down over the brine coils, what happened to it at the bottom of the refrigerator room? [414]

A. What happened to the water?

(Deposition of Jesse O. Brandt)

DQ94. Yes.

A. It went down into the cellar, ran into a sewer into the cooling room well in the next building where our water pump was and we pumped it back up over the coils again.

DQ95. Will you state whether or not there was any change in the water defrosting structure as you have described it during the period when you were there from 1909 to whenever the Dry Blast Plant closed in 1920 or 1921?

A. From my time until they finished there was never no change. As it was, it was until they tore it down.

DQ96. Do you know why Dry Blast was given up?

A. I do not. I could not say that.

DQ97. Do you know whether the water defrosting was satisfactory?

Mr. Lyon: Objected to as calling for a conclusion of the witness. State what it does.

I think that was your statement?

Mr. Neave: Probably.

A. It cleaned the coils off. It defrosted. It really was.

DQ98. Did you have any trouble with the water freezing in any of the pipes? A. In my times, no.

DQ99. Have you made any model of the water defrosting system [415] as you have described it here?

A. I have.

DQ100. Would you be so good as to produce it?

A. I will.

DQ101. Mr. Brandt, this model which you have produced, did you make this? A. I did.

DQ102. Now, in order to orientate ourselves, I see that on the model you have a ladder which goes up to a door and on the other side of the door is a catwalk which

(Deposition of Jesse O. Brandt)

you have referred to in your testimony. Is the catwalk and the whole side of the model along which the catwalk runs inside or outdoors? A. Outdoors.

DQ103. And is the ladder indoors or outdoors?

A. Indoors.

DQ104. In what portion of the building is that ladder situated, what room?

A. In the engine room, near the engine room.

DQ105. Now, will you please describe that portion of the model which is in the engine room, i. e., on the same side of the wall as the ladder?

A. This section here, these coils are all in the engine room.

DQ106. What are the coils that are at the top? [416]

A. Ammonia compressor coils, condenser coils, and over the top of the ammonia condenser coils is a pipe.

DQ107. What is that pipe for?

A. Water feed line liquefying this ammonia gas.

DQ108. Actually the coils?

A. Yes for liquefying this ammonia gas.

DQ109. And underneath the condenser coils is a tank. What is that for?

A. It is for water. To collect the water from the condenser and also for defrosting use.

DQ110. Out of that tank you have a pipe leading down to a valve and then the pipe goes out through the engine room walls, outdoors adjacent to the catwalk. What is the valve in that pipe?

A. That is for defrosting purposes, use water for defrosting.

(Deposition of Jesse O. Brandt)

DQ111. When would the operator open that valve?

A. After he went through his procedure in the cooling room.

DQ112. What was the purpose of opening the valve?

A. To let water up in and defrost this section.

DQ113. Let us go outdoors and along the catwalk. I see that on the model there is a header pipe along the catwalk from which four pipes rise and go through the wall of the refrigerator room. Is that correct? [417]

A. That is correct.

DQ114. Will you describe the various valves that are situated on each of those? A. Outside?

DQ115. Outside.

A. Six inch valve leading up in from the inside on the header—6 inch valve leading up to the top goes into a header inside the building. That is for feed water in there for defrosting purposes.

DQ116. On your model that is represented by the brass valve? A. Brass valve, yes, sir.

DQ117. What is the little red thing above?

A. That is a drain valve; represents a drain valve. That is the reason I painted that red. Represents a drain valve.

DQ118. Is there one such drain valve on each of the risers from the header? A. There is.

DQ119. What is the red thing on the end of the header?

A. Also a drain valve.

DQ120. Are those the drain valves to which you referred in your previous testimony? A. They are.

(Deposition of Jesse O. Brandt)

DQ121. In your model, on the roof of the refrigerator [418] building, there is a pipe. What is that pipe?

A. Air manifold.

DQ122. Where was this air taken through this manifold?

A. The blowing engines pumped it out of there and from there into the blast furnace.

DQ123. I find that the roof of this model is removable and in opening it up, I find that there are certain gates. What are they for?

A. For shutting off air in the compartment they are defrosting.

DQ124. Was there only one such gate?

A. There were four, one for each compartment.

DQ125. Was there means for keeping the gate closed?

A. There was. Rods went through with wedges put in them, steel rods.

DQ126. When was this gate kept closed?

A. While they were defrosting.

DQ127. Looking down through the open top of the refrigerator room, would you be good enough to describe what you have shown in the model in one of the four compartments?

A. I have a header line in there, 6 inch header line.

DQ128. For water?

A. Water for defrosting purposes. Two coils representing brine coils. Two water feed lines coming off the header for defrosting. [419]

DQ129. Where are those water feed lines?

A. The 6 inch header inside the building.

DQ130. Above the coils?

A. Above the coils.

(Deposition of Jesse O. Brandt)

DQ131. Your model shows only one such header, and one set of coils and one set of two spray pipes. Was there more than one section to the refrigerator building?

A. There were. There were four.

DQ132. Were they all identical.

A. They were all identical.

DQ133. Were they like the construction you have shown in your model?

A. As close as I can give it to you, the same as the model.

DQ134. Would you please trace on the model how the air was introduced into the refrigerator building and how the air left the building?

A. I could give you a little demonstration. Over in here, there was a building down in here with a roof on it.

DQ135. Below the catwalk?

A. Yes, probably 3 feet below. Sixteen inch fan, 14 or 16 inch air fan. Lattice work in part of the roof out here to collect atmosphere from out in here.

DQ136. Sixteen inch or 16 foot?

A. Sixteen foot. Sixteen foot fan, it collected the air [420] here, drove it down through a shaft in the cooling cellar and when this fellow defrosted that is where he closed this solid door to shut the air off the compartment he was defrosting. Three solid doors open on the compartments that were in use. The fan drove it up through here up through these compartments and the blowing engines pumped it into the blast furnace.

DQ137. And the air was pumped through the compartments of the refrigerator room? A. Yes, sir.

DQ138. And then up into the blast furnace?

A. Yes, into the blast furnace.

(Deposition of Jesse O. Brandt)

Mr. Neave: Will you please mark this model Plaintiff's Exhibit #10?

DQ139. Mr. Brandt, do you recall whether there were more than two coils, brine coils in each compartment and more than two perforated water sprays?

A. There were more than two.

DQ140. There were more than two?

A. My recollection is there were 16 coils.

DQ141. You have just shown two.

A. I have just shown two in my model.

DQ142. Is the refrigerator building still standing?

A. The building is still standing, yes, sir.

DQ143. Is there any of this equipment in the building?

A. Nothing whatever.

DQ144. I show you a photograph of the outside of a [421] building and ask you whether you recognize it.

A. I do. It is the outside of this model right here.

DQ145. It is the outside of the refrigerator building?

A. Yes, sir.

DQ146. At the Isabella Furnaces?

A. Yes, sir, it is.

DQ147. On the left hand side of the picture, I see an opening in a wall. Can you identify that opening?

A. That is the opening for the catwalk right here. This door was right here.

DQ148. That is the doorway that leads—

A. That leads out on the catwalk.

DQ149. From where?

A. From the engine room to the catwalk.

(Deposition of Jesse O. Brandt)

DQ150. I see on the wall what look like metal prongs coming out. What are they?

A. They could have been the pipe header line, 6 inch pipe going in to the building.

DQ151. Were they on that level?

A. No. They were higher. I am wrong. They were higher than that.

DQ152. Can you find the place where the header lines went in? A. Yes, I can.

DQ153. How many are there? [422] A. Four.

DQ154. Those are dark places?

A. Yes. Six inch header line.

DQ155. This is a correct reproduction of the condition of the outside of the refrigerator building as it is now?

A. Yes, sir.

The Court: You say that is Exhibit 11?

Mr. Neave: It hasn't been marked as yet, your Honor. It is Exhibit 11, your Honor.

The Court: The witness said he could find four holes. I see only one hole in the wall.

(Conference between counsel.)

The Court: We will have a short recess.

(Short recess.) [423]

Cross Examination

Mr. Lyon:

CQ1. Mr. Brandt, you are now employed by Carnegie Steel Company, are you?

A. Yes, sir.

(Deposition of Jesse O. Brandt)

CQ2. In collecting this evidence and making this model that you have here produced and explained, identified as Plaintiff's Exhibit #10, for whom are you working?

A. Carnegie-Illinois Steel Corporation.

CQ3. Did anybody pay you for making that model?

A. No, sir.

CQ4. Did Carnegie-Illinois Steel direct you to make that?

A. No, sir. I made it myself on my own hook.

CQ5. Nobody directed you?

A. Nobody directed me.

CQ6. Nobody requested you?

A. Nobody requested me.

CQ7. In giving your testimony here, have you been paid or promised remuneration for it?

A. I have not been paid a penny for it.

CQ8. How long has it been since you saw this operation of this blower house which is now dismantled?

A. This concern here?

CQ9. Yes. A. In operation? [424]

CQ10. Yes. A. About 1918.

CQ11. You have had no occasion to refer to it between this investigation and the time you last saw it in 1918?

A. No, sir.

CQ12. From what did you make this model, Plaintiff's Exhibit #10?

A. How do you mean, from what did I make it?

CQ13. Yes.

A. I don't quite get you.

(Deposition of Jesse O. Brandt)

CQ14 Did you make it from memory or from drawings?

A. Out of my mind. Had no blue prints. I really don't know how to read them right. Couldn't make it if I had a blue print.

CQ15. You can't read blue prints?

A. Not so well.

CQ16. How long after Mr. McCarthy first approached you was it that you made this model?

A. How long?

CQ17. Yes.

A. I started this model—when I really first had it in mind, my foreman, Bruce Walter, out at the plant—he is dead now, told me there would be some kind of a concern like this come up. I had it in mind then. I made it about two weeks ago. [425]

CQ18. How long after Mr. McCarthy called on you?

A. About a week or more probably.

CQ19. Mr. McCarthy, as you understood, was an investigator employed by the York Company?

A. I do not know who he was employed by. He was up at our office and I was called up to the office and saw him. He asked me about different men who worked at the plant, where he could find them, their names. That is all I had to do with Mr. McCarthy.

CQ20. He didn't discuss, that you recall, what he was looking for?

A. He talked about Dry Blast business, about defrosting, who the men was that defrosted. I told him his name, Harry Haney. Henry Hartman, different men who worked in the plant.

(Deposition of Jesse O. Brandt)

CQ21. You have testified, I believe, according to this model and this installation, that you recall that on this water line, which is the silver water line just opposite what you have referred to as the catwalk that there is at the end of that line a vent valve which you say is marked in red.

A. Drain valve, yes, sir.

CQ22. That line is located out in the atmosphere?

A. In the open, yes, sir.

CQ23. And if there was not a provision made for draining that line and water was maintained in it during the Winter months, that line would freeze? [426]

A. That was covered with an asbestos cover.

CQ24. As a matter of safety, as in all outside pipes in this territory in freezing weather, you would open that drain valve to drain the line so water would not freeze inside of it?

A. Yes, sir.

CQ25. Leading up from that pipe, which we have just identified and which is the silver colored pipe opposite the catwalk, are four vertical pipes?

A. Yes, sir.

CQ26. And those extend beyond the valves that are in them up outside of the wall for a distance before they enter the inside of the room?

A. Yes, sir.

CQ27. And for the same reason, to prevent freezing of those pipes in freezing weather, it would be necessary to drain them, would it not?

A. Yes, sir.

CQ28. And that is the purpose of the drain valves which you have marked in red?

A. Either here or here, either place.

CQ29. And the purpose was to keep the pipes from freezing during freezing weather?

A. Yes, sir.

(Deposition of Jesse O. Brandt)

CQ30. Now, Mr. Brandt, do you understand what the purpose of this operation of blowing the air over these coils was? [427]

A. Yes, sir.

CQ31. It was to remove—

A. It was to remove moisture out of the air.

CQ32. And to remove the moisture out of the air, it is only necessary to reduce the temperature of that air to a point where it is below the dew point of the air entering the system? A. Below freezing.

CQ33. Below the dew point?

A. Below the dew point.

CQ34. It isn't necessary to go below freezing?

The Court: What was the last answer? "Below the dew point" and not below freezing?

Mr. O'Hearn: The last answer was, "Below the dew point."

The Court: Well, go ahead.

CQ34. It isn't necessary to go below freezing?

A. We went below freezing. It would some times probably.

CQ35. Sometimes you went below freezing?

A. Sometimes we went below freezing, yes.

CQ36. Did you ever measure or are there any figures available showing the temperature of the air passing through this silver collector pipe or stack pipe which is at the top of this model and which is connected with the four vertical conduits which lead to the respective cooling chambers?

A. We took cyclimatical readings with this pipe coming [428] from here down in there and put our wet and dry thermometers down in the engine room.

(Deposition of Jesse O. Brandt)

CQ37. Did you ever take temperature readings of the discharged air?

A. No, only in the engine room.

CQ38. Never took it up here? A. No, sir.

CQ39. You have no figures then which show the temperature of the air discharged from these cooling chambers? A. No, sir.

CQ40. Did you ever take the temperature at any time during the operation of the spray header pipes?

A. No, sir.

CQ41. Don't know what that was?

A. Never took that temperature.

CQ42. Don't know whether it was above or below freezing?

A. It would be above freezing always.

CQ43. It would be above freezing?

A. Normal river water degrees most of the time.

Mr. Neave: That is the temperature of the water?

A. Yes. Water.

CQ44. That would be above freezing at all times?

A. Yes, sir.

CQ45. In this construction, isn't it true that from the outlet which connects with this black "L" right across through [429] the spray header pipes the entire system was on a level?

A. No. It was elevated so it would drain.

CQ46. Elevated which way?

A. Toward the outside of the building.

CQ47. You can't read the drawings, can you?

A. Well, not so well.

(Deposition of Jesse O. Brandt)

CQ48. I will ask you to refer to the drawing, Plaintiff's Exhibit #1, and tell me if the drawing, Plaintiff's Exhibit #1, is in error in that respect. In the drawing, I believe, that the pipe which is indicated as "Water Spray 2 inch Pipe" is shown as a horizontal pipe. Is your testimony that the drawing is in error in that respect?

A. Well, it could be elevated a little. It was just set on brackets or racks up in there and could be moved so the water would run down. There is perforated holes in there.

CQ49. The pipe however in this drawing, as you see it, is shown horizontal? A. Yes.

CQ50. And as far as you know, the installation was made as that drawing indicates. Isn't that correct?

A. You asked me if that was correct?

CQ51. Yes. A. It is correct.

CQ52. You never got up there and measured that pipe or changed its condition of elevation yourself? [430]

A. We renewed some of the pipe in there.

CQ53. You never changed it or changed the position of the brackets? A. No.

CQ54. You renewed some of them, some of the defrosting pipes? A. Yes.

CQ55. And if you wanted to know whether they were level or not, the only way would be to put a level on?

A. We never done that. It wasn't necessary.

CQ56. Mr. Brandt, you stated that on an average it took 1-1/2 hours to defrost these coils in each chamber. Is that correct?

A. Sometimes longer and sometimes sooner. All depends on the weather. I couldn't give you a definite answer. All depends on weather conditions.

(Deposition of Jesse O. Brandt)

CQ57. Just what was the average time that you can fix?

A. 1-1/2 hours; 1-3/4 hours in the summer time.

CQ58. In the Summer time, about 1-3/4 hours?

A. Yes.

CQ59. And in the Winter correspondingly longer?

A. Yes, sir.

CQ60. As I understand, the water was taken from the drip pan underneath the ammonia coils, passed down through the turn through this valve which is immediately under the drip pan, [431] down across this horizontal header and up through the vertical pipe which led to the coils which you wanted to defrost.

A. Yes, sir.

CQ61. That water was then sprayed out over the coils?

A. Yes, sir.

CQ62. And passed down into a sump in the floor?

A. In the cellar.

CQ63. And that sump was connected with the circulation pipe?

A. The sewer in the cellar was connected with a well we had on the outside of this defrosting machine cooling room.

CQ64. I think you testified there was a circulation pipe?

A. Running into the outside of the building. This well connects on the outside of our refrigerator room—on the cellar outside.

(Deposition of Jesse O. Brandt)

CQ65. But that water was not pumped back that pump to pass through this spray header?

A. Yes, sir. Pumped through here and up into this tank and used over again. What we did not use went into the sewer in the river.

CQ66. But this was a closed circulation system in that the water which was once sprayed over these pipes was re-circulated back through the tanks and up into this drain pipe?

A. Yes, sir. Back through and down and back over the coils. The surplus went into the sewer. [432]

CQ67. The surplus went into the sewer?

A. Yes, sir.

CQ68. Same water was re-circulated?

A. Yes, with fresh river water mixed in with that.

CQ69. Some additional fresh water and some of the same water?

A. Yes, from the frost melting off.

CQ70. That is, surplus water came from the amount of frost that was developed and thawed off and that surplus water went down into the sewer?

A. Mixed in with the fresh river water. The river supply was going through there continuously, all the time, regardless of thawing off or no thawing off, defrosting.

CQ71. Let us get this one part; that water which was coming into that drain pan went over the coils and was collected after it went over the coils?—

A. Yes.

(Deposition of Jesse O. Brandt)

CQ72. Together with the amount of water which resulted from the melting of the frost, the excess of that water over and above what was required was drained into the river.

A. Into the overflow into the river.

CQ73. That water that was in the basement was pumped back over the ammonia coils? A. Yes, sir.

CQ74. Drained into the drain pipe and went back through the [433] same cycle?

A. Some of it. Some went out mixed in with the river water,

CQ75. Where did the river water come from?

A. Our own pumping station.

CQ76. Where did the river water enter?

A. Under the ground, through here, into the well.

CQ77. Into this sump? A. Yes, sir.

CQ78. And this sump also was connected with the source of water from the river? A. Yes, sir.

CQ79. So that this sump collected water both after it passed over the coils and also from the river?

A. From our supply tank.

CQ80. Now, in this operation and before the water was turned on to go over these pipes, I understand your testimony to be that there were several things done, including the shutting off of the air circulation through it.

A. Yes, sir.

CQ81. The draining of the brine from the coils down into, I believe if you look at the drawing, into the brine storage tank in the cellar? A. Yes, sir.

(Deposition of Jesse O. Brandt)

CQ82. The water, as you testified, left these spray header [434] pipe at about 50° to 55° Fahrenheit?

A. I did not say after it left the coils.

CQ83. After it left the spray pipes—

A. Yes, sir.

CQ84. —it was about 50° to 55° Fahrenheit?

A. Average, yes.

CQ85. There was a practically solid stack of coils in each of these four chambers or compartments. Is that correct?

A. Yes, sir.

CQ86. In fact, there was just enough room in there for air to get through?

A. Yes, sir.

CQ87. Otherwise, it was just packed with coils?

A. It was packed with coils, 2 inch pipe.

CQ88. And, as you recollect, there were instead of 2 coils in that chamber, as you have in this model, Plaintiff's Exhibit #10, there were 16?

A. I would judge 16 to 18 coils.

CQ89. Sixteen to 18 coils?

A. Yes, sir.

CQ90. How high was that chamber?

A. I could not really tell you. If it was four stories, I would say about 35 feet high.

CQ91. About 35 feet?

A. Yes. [435]

CQ92. How closely were those coils together horizontally?

A. I would say $\frac{3}{4}$ inch.

CQ93. That is, the clearance space between the outside of the pipes was $\frac{3}{4}$ inch?

A. Three-quarters of an inch.

(Deposition of Jesse O. Brandt)

CQ94. How close were they together arranged in their vertical tiers?

A. About three quarters to one inch. The elbows would take some of that pipe—about $\frac{3}{4}$ inch; set in on brackets and arranged for that.

CQ95. During this defrosting operation that you state was performed here, did you ever take the temperature of the air within that compartment during defrosting?

A. No, sir.

CQ96. Did you ever take the temperature of the air in that chamber at the end of the defrosting operation?

A. No, sir, not until after it was probably a half hour after when time came for taking readings. If it was on the hour we took it but we did not take it except on the hour.

CQ97. Isn't it a fact, Mr. Brandt, that before you started the air to re-circulate through a compartment after you would defrost the coils in that compartment that you allowed a period of time to elapse after you started that brine recirculating before you opened the air valves to let the air in and out of that chamber? [436]

A. Yes, we did. By the time that man did his duty outside there there would be time enough for him to open the air ducts in the top here.

CQ98. About how long was the time that elapsed between the starting of re-circulation of the brine to the cooling coils before these two valves were opened that is to let the air in at the bottom and out at the top?

A. I would say about 15 to 20 minutes, all depending on how fast the man traveled who was doing the job.

CQ99. There wasn't any specific time? A. No.

(Deposition of Jesse O. Brandt)

CQ100. You didn't wait and take a reading of the temperature of the air in this chamber before you opened the air valves?

A. Not unless it was time to take readings on the hour.

CQ101. Unless it happened to come at the time you were taking the readings on the hour?

A. We took readings every hour to figure this moisture out.

CQ102. Do you have any figures or are any figures in the files of Carnegie-Illinois Steel which show the amount of water removed from the air by that operation?

A. I think they lost them in the 1936 flood. I would not have any in our engine room department and they do not have any in the office.

CQ103. You don't know what proportion of the water was [437] removed from the air passing through this cooling cycle?

A. No. It was so long since I have taken any readings of that.

CQ104. Just one other point here, Mr. Brandt, I believe on the outside of the building immediately underneath the spray pan there is also indicated a drain. Is that right?

A. Emergency steam line.

CQ105. Emergency steam line? A. Yes, sir.

CQ106. That was put on there in case that pipe froze up from failure to drain?

A. Emergency to clean out. We could clean out with that any time. It never froze up.

(Deposition of Jesse O. Brandt)

CQ107. That steam pipe was there for two purposes, one to clean out the line, and the other to thaw it out in the event it became frozen?

A. You could use it for three purposes, maybe more, whatever purpose you chose.

CQ108. What was the other purpose?

A. You could blow out your line either way. You could clean out your line. If the line froze up, you could thaw it out. You could hasten your defrosting business with it if you cared to.

CQ109. That is, you could enter steam in there to speed defrosting? [438]

A. Speed defrosting if so desired.

CQ110. Did you ever see anybody do that?

A. No.

CQ111. Did you ever conduct defrosting operations yourself? A. No. It was not my duty.

CQ112. Did you ever watch the complete operation?

A. No, not the complete operation.

CQ113. Then you don't actually know of your own knowledge whether the operator actually entered steam—

A. I could see from the engine room. I could see that. My duty was in the inside of the engine room.

CQ114. You testified they never used steam in that way?

A. Not to my knowledge, they never did, that I saw.

CQ115. That was one of the purposes for which the steam line was provided?

A. Provided for thawing if it froze up.

(Deposition of Jesse O. Brandt)

Redirect Examination

Mr. Neave:

RDQ1. Mr. Brandt, when you opened the drain on the uprights above the water valve which are on the outside of the building just above the catwalk, what was drained by that drain, what portions of the pipe?

Mr. Lyon: I will have to object to that on the ground that the witness is not qualified. He said he never saw the operation. [439]

The Court: Overruled.

Mr. Neave:

RDQ2. Will you tell me whether you had under your direction and supervision the operators who conducted the defrosting?

A. To a certain extent, yes.

RDQ3. As far as defrosting is concerned, they were in your department?

A. They were in my department, yes, sir.

RDQ4. Did you observe any defrosting man doing the draining operation?

A. Not all through the course, no.

RDQ5. Did you ever observe any man operating the drains on these upright headers?

A. I could see them operating them from the engine room. I could see these two front ones from the engine room.

RDQ6. What did that drain?

A. Drained your defrosting pipe. The pipe inside.

RDQ7. The pipe inside the refrigerator compartment?

A. Refrigerator compartment, yes, sir.

(Deposition of Jesse O. Brandt)

RDQ8. While you were on the Dry Blast Plant, did you know of any instance when the water pipes inside of the refrigerating room were frozen?

A. Never. [440]

Recross Examination

My Lyon:

RCQ1. Did you ever personally, Mr. Brandt, inspect the header pipes, spray pipes over the coils to find out whether they were drained of water?

A. Never did. That was up to the coil tender.

(Thereupon a portion of the deposition of William Swope was read, whereupon the following proceedings were had:)

The Court: Just a minute. Is this testimony just cumulative of what the previous man testified to?

Mr. Neave: Yes, sir.

The Court: Or is there anything new about temperature?

Mr. Neave: No, nothing new about temperature.

The Court: His testimony is merely corroborative?

Mr. Neave: Corroborative.

Mr Lewis Lyon: Except that it does not corroborate it in many respects. One of the most material reasons is the drain valve. You will recall that the first witness said you could sit in the steam room and see the man operate it, and the next witness now comes along and on cross examination says that there was a double door there and you could not possibly see through the door from the steam room. There are other differences.

The Court: All right. What I was trying to do was to save the reading of the deposition if all that this other [441] witness had to offer was corroborative, because at this time I think I understand the model without having each witness go over it and explain all the valves, and so forth.

Is there anything in it that is other than cumulative or corroborative?

Mr. Neave: Not so far as I am concerned.

Mr. Lewis Lyon: The only thing that is material—

The Court: Of course, it is your law suit. You can offer it, if you want to, but there is no use in just being repetitive here.

Mr. Neave: No, I don't care anything about offering it, so far as that is concerned.

The Court: All right. Does Mr. Lyon want to offer it?

Mr. Lewis Lyon: There are several things. Mr Neave, if I could have a stipulation to this effect, we probably could avoid it and I think the record would show it, that this chamber was divided into four parts, and the additional testimony of the witnesses established that when—

The Court: You mean this witness?

Mr. Lewis Lyon: These witnesses here that he is not going to use, as I understand, any of them.

The Court: Are there more?

Mr. Neave: There are several other witnesses.

The Court: There are several other witnesses on the Pittsburgh matter? [442]

Mr. Neave: That is right.

Mr. Lewis Lyon: That is right.

The Court: And they are all cumulative?

Mr. Neave: No, some of them, and some different.

The Court: Is there any one who will testify as to what the temperature of the room was, or at which it had to be maintained?

Mr. Lewis Lyon: No.

Mr. Neave: What they testified to was that it was below freezing. They didn't have any charts.

The Court: One man said it wasn't below freezing. This man said it was when he was in there, and the previous witness testified they never maintained it below freezing.

Mr. Neave: No, sir, the previous witness I think said it was below freezing.

The Court: That it was below the dew point.

Mr. Neave: He said that, and that it was below freezing.

The Court: I was watching that part of his testimony particularly, and as I remember, the question was asked again and he said it was above.

Mr. Neave: You are referring to Mr. Brandt's testimony?

The Court: Yes, Brandt. Well, maybe we cannot save any time, but I just thought we could.

Mr. Neave: I am perfectly willing not to offer Mr Swope's deposition. [443]

The Court: Anything that is just cumulative here, I can't see any necessity of going over and over it again.

Mr. Neave: I will withdraw Mr. Swope's deposition, your Honor.

The Court: All right. Let's go to the next.

Mr. Lewis Lyon: Wait just a minute. I just want to look at this here. The direct examination has been read, without the cross examination.

Mr. Neave: I am withdrawing it.

Mr. Lewis Lyon: Also, it leaves out the entire discrepancy in the witness' testimony which has already been read in the record.

The Court: He is withdrawing it. He has moved that it be withdrawn.

Mr. Neave: Be stricken, because Mr. Brandt testified on direct.

Mr. O'Hearn: Page 28, Mr. Neave.

Mr. Neave: Page 28, is it?

Mr. O'Hearn: About half way down.

Mr. Lewis Lyon: At page 45, on cross examination, your Honor, is the testimony you referred to.

The Court: Is that what I thought it was?

Mr. Lewis Lyon: Yes.

The Court: That it was below the dew point, but it was above freezing. On direct he said it was below freezing. [444]

Mr. Neave: That is right.

The Court: But on his cross examination he said it was below dew point and never below freezing.

Mr. Neave: Let's go back to just what the testimony was.

Mr. Lewis Lyon: He said maybe sometimes it went below freezing, on his cross examination, but it was not necessary.

Mr. Neave: He said sometimes. On direct he said it was below freezing and on cross he said sometimes below freezing.

The Court: But I got the general impression from the reading that in order to get an efficient operation they had to have it below dew point.

Mr. Neave: I think the testimony will show it was below freezing, before we get through.

Mr. Lewis Lyon: I don't. Furthermore, there is no testimony of any kind as to the temperature in the chamber, in the isolated chamber, during defrosting.

The Court: It isn't in yet. We can argue that when we get to it. But my point in raising it now was to see whether any of the other witnesses regarding the Pittsburgh operation could give some new evidence rather than just repetition, rather than have you be just reading: Is this the valve here, or there.

Mr. Neave: I withdraw Mr. Swope's deposition.

The Court: All right. Your motion to withdraw it is granted and the reporter need not write it up. [445]

Mr. Neave: What I can do, if your Honor please, is to go over some of the remaining Pittsburgh depositions, if your Honor is going to adjourn in a few minutes—

The Court: I would like to press ahead.

Mr. Neave: Then I think we had better continue to read the next deposition.

The Court: Unless you think you could save time by our adjourning now?

Mr. Neave: What I was going to suggest—I am not interrupting you?

The Court: No; go ahead.

Mr. Neave: We have to have some repetition testimony for corroboration. It may not be necessary to read that, your Honor. We could offer it and have the reporter copy it without reading it to your Honor, but I am not prepared to say at the moment which of those depositions I would just offer rather than have read.

The Court: I see.

Mr. Neave: And if you wanted to adjourn now this afternoon, I could go over them and maybe save two or three depositions.

The Court: That might be true, or you might save a lot of questions and answers in other depositions, such as the Swope deposition. I suppose there was some testimony in there concerning the temperature, but just to ask the same questions to [446] witness after witness, and I know when you are examining witnesses you can't help it, but it does take time to have somebody sit down and explain this thing over and over again.

Mr. Neave: Yes. Of course, one of the things about prior use is that we have to be careful to have corroborative testimony.

The Court: To have what?

Mr. Neave: To have corroborative testimony where it can be obtained. So I want to have the privilege of putting that in, even though it may be repetition, but some of it might not have to be read to your Honor but just go into the record.

The Court: I think that maybe might save some time. That is, you might introduce, instead of whole depositions, just pages so-and-so, say, the following lines and the following testimony, and then if it is material or if the other side wants to introduce anything further for any purpose, why, we can settle that at that time.

Mr. Lewis Lyon: I don't think that will save any time, your Honor, because we don't know in advance what he is going to pick out.

The Court: You don't think it would save any time?

Mr. Lewis Lyon: I don't think it would. Either he should offer the entire deposition, and it will be deemed to

be read, or should read them. I don't think a piecemeal proposition is going to save anything, unless there are certain depositions [447] they don't want to offer at all.

Mr. Neave: I think, your Honor, we would want to either read to your Honor the deposition or offer it, or not offer it at all, one of those three things, and I will be very glad to decide which, if I can.

Mr. Lewis Lyon: That might save some time, if you want to throw some out.

The Court: Everything that you have read in Swope's deposition is just a matter of asking him about this model here.

Mr. Neave: That is right.

The Court: And about what the position was before. One witness testifying to a fact is sufficient to prove it, if he is worthy of credence, and I can't see that it would make any difference, but if you think some time can be saved by that, we will recess now. Otherwise we will continue until 5:00 o'clock.

Mr. Neave: I think some time can be saved. I will go over it tonight.

The Court: Then we will recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p. m., Thursday, September 19, 1946, an adjournment was taken until Friday, September 20, 1946., at 10:00 o'clock a. m.) [448]

Los Angeles, California; September 20, 1946; 10:00 o'clock a. m.

The Court: Ex parte?

The Clerk: No ex parte, your Honor. Further trial.

The Court: Proceed.

Mr. Neave: May it please the court, the next witness called was Edward G. Kennedy. I would like to offer the direct examination of Mr. Kennedy, and I will, with the court's permission, not read it but summarize it.

Mr. Lewis Lyon: Your Honor, I do not think that that proposition is agreeable.

The Court: Let me see the deposition so I can see what you are talking about.

(The deposition referred to was passed to the court.)

The Court: Is there any question in your mind but what his name was Edward George Kennedy?

Mr. Lewis Lyon: No, your Honor.

The Court: Or that he lived at 13 Wible Street, Etna, Pennsylvania?

Mr. Lewis Lyon: No.

The Court: And that he worked for the Carnegie Steel Company from 1893 to December 1915?

Mr. Lewis Lyon: No.

The Court: That he worked in the dry blast plant?

Mr. Lewis Lyon: No. [451]

The Court: Why cannot counsel just make those preliminary statements and come down to the questions and answers that are material?

Mr. Lewis Lyon: I didn't think that that was his purpose; that he was going to summarize the whole deposition in the form of argument. That is what I was objecting to, your Honor.

The Court: I did not so understand it.

Mr. Neave: My proposal was that I thought, in line with your Honor's suggestion yesterday, that this deposition be copied into the record by the reporter and that instead of reading it to your Honor to save time I would not argue it but simply state what the general contents of the deposition were.

The Court: All right. Here on two pages I have read everything down to that they had a dry blast plant, that they had compressors, that they had two 225-ton York machines and that they used ammonia and they had an explosion and then they turned around and put in a brine system.

What in your mind, counsel, did this witness prove?

Mr. Neave: This witness proved that during the years when he was working at the plant in 1905 he started running the dry blast plant there. He then operated it and knew how the plant operated.

He testified about the system of piping. [452]

The Court: Which is a repetition of this.

Mr. Neave: It is corroboration of that, your Honor, and that is why I am suggesting that it not be read but it has to be in the record.

Mr. Lewis Lyon: I have no objection, your Honor, to that procedure except to the proposition of arguing it.

Mr. Neave: I am not going to argue it, I am just trying to tell your Honor what it is all about.

The Court: All right.

Mr. Neave: He then stated on page 78, Question 32:

"DQ32. What was the temperature of the cooling room before you started defrosting?

"A I could not tell you. That was way under freezing, way under freezing, when you started to defrost.

“DQ33. Did you ever go into the cooling room?

“A. Yes.

“DQ34. Was it pretty cold?

“A. You would put an overcoat on if you had one and if you hadn’t you went in without one and took a chance.”

He then identified Plaintiff’s Exhibit 1, which was the drawing showing the defrosting layout.

The Court: I have read it here down to where you started reading, possibly the previous question, but everything down to there is all preliminary, don’t you think, counsel?

Mr. Lewis Lyon: Yes, your Honor. [453]

The Court: Why take up half an hour’s time in reading it then?

Mr. Lewis Lyon: I see no reason in doing that, your Honor. My only objection was as to arguing the effect of it at the present time or making any interpretation of it.

The Court: I think that we can trust you to see that if counsel starts to argue in his statement of summary that you will object.

Mr. Lewis Lyon: All right, your Honor. That is what I did.

Mr. Neave: Now, your Honor, do I understand the procedure is that the direct examination of this witness is to be reported, and copied from this deposition?

The Court: Let me suggest this—I do not know whether this is good or bad—but if I were in your position and the judge had made the suggestion that I have made, I would say: “We next have the deposition of Edward George Kennedy, who lived at 13 Wible Street, Etna, Pennsylvania, who worked for the Carnegie Steel Company and who worked in and about the cooling room (or what-

ever you call it) and who in the first part of his deposition identifies the exhibit and makes practically the same explanation of this operation down to page 78, where I want to read the thing that is material," and then you read the things that you think are material.

Mr. Neave: All I am thinking about, your Honor—I [454] don't want to read the cumulative material, but I would like to have it copied into the record.

The Court: I see no reason why you can't in view of the summary statement which you can make in three lines which can consume seven or eight pages of reading.

Mr. Neave: I would like to have pages 74 through 83 copied into the record, and the summary that I have given your Honor is all the summary that is necessary of this deposition. You have heard the summary of it now so that I don't think we need to take any more of your Honor's time on that if those pages are copied into the record.

The Court: All right. Do you see any objection to that?

Mr. Lewis Lyon: No, your Honor.

The Court: In other words, if he makes a summary statement concerning the cumulative matters. He reads the questions and answers which he thinks this witness adds to additional proof on the material issues of the case. Then the whole deposition is copied into the record so that for the benefit of argument you may have it in the event that there is something that should be specifically called to the Court's attention which he has not read or which you wish to take advantage of on cross examination or otherwise. So he finished his direct examination.

Mr. Lewis Lyon: That, as I understand it, is the entire deposition, both direct and cross, that is to be copied in? [455]

The Court: You have got to make your determination about the cross examination. Now if you want to read all the cross—

Mr. Lewis Lyon: No, not all of it.

The Court: Then you make the same kind of a statement on your cross examination he has made, he and you and I together, on the direct.

Mr. Lewis Lyon: I will simply ask that the cross examination be copied into the record at this time. I believe that the witness corroborates the facts developed on the cross examination of the first witness, Mr. Brandt.

The Court: Now you are arguing,

Mr. Lewis Lyon: All right. I will ask that it be stricken.

The Court: All right.

What is there in here that you want to read in the cross in question and answer form which, so far as I can see, up to this time as revealed by the testimony turns on the question of the temperature of the cold room when they were defrosting it?

Mr. Neave: Our position is that the testimony—I don't want to argue it—our position is that the testimony says that it is below freezing. Now there are no records produced by these witnesses to support that because they had all been destroyed. [456]

Our further position is that the prior use is an effective prior use whether the temperature was above or below freezing.

The Court: I think I understand your whole position.

Mr. Neave: Very good, sir.

The Court: But right now the state of the record is that this situation existed there and they did defrost with water and the situation of the pipes and the drain.

Mr. Neave: Yes.

The Court: I doubt if the defendant would have any testimony to prove that that plant didn't exist.

Mr. Lewis Lyon: No, your Honor. The question is as to its condition and as to its operation in which we will put on further evidence, and also from the standpoint of the cross examination.

In the cross examination of Mr. Kennedy I would like to call the court's attention at this time to page 86, Question 22, having particularly to do with the so-called drain valve.

The Court: All right. Now will you read into the record the questions and answers?

Mr. Lewis Lyon: Yes, your Honor.

"CQ22. Similarly, above each one of these valves which led to the spray headers there was a drain valve to drain that portion of the line which was above that valve?

"A. This drain here? [457]

"CQ23. Yes.

"A. To my knowledge, it was below this valve.

"CQ24. And then this model is wrong in that it has a relief valve above the stand pipe—above rather than below it? "A. Yes.

"CQ25. Therefore, the operation would be to cut off this valve leading to the standpipe to stop the water from flowing through the spray header and then open the drain

valve which was located on the other side and below that control valve?

"A. To the best of my knowledge, yes.

"CQ26. That drain valve then operated to drain only that portion of the line which was below the control valve to the spray header? "A. Yes.

"CQ27. You operated that system yourself, did you?

"A. Yes, sir.

"CQ28. Many times.

"A. I operated that for quite a little while before I was sent over as chief engineer.

"CQ29. You believe you know, when you say that drain valve was located in that position, what you speak of?

"A. That has been so long ago that, you know, I could possibly be mistaken on that myself.

"CQ30. You actually operated the system?

"A. Yes. [458]

"CQ31. Is it an actual fact, Mr. Kennedy, that the reason this system was drained was because this whole pipe system outside of this plyboard structure and outside of this second plyboard structure was out in the open air and if you did not drain it because of freezing weather conditions you were liable to freeze up the whole system?

"A. There wasn't much chance so long as you kept that valve open.

"CQ32. You were supposed to keep that open to avoid freezing it up? "A. Yes."

Mr. Neave: Now I offer the redirect examination, all of it, and call your Honor's attention to page 88, to redirect Question 10:

"RDQ10. What about the water in the pipes that are above the valves that turn the water off and on? How do you drain the water out of those vertical pipes?

"A. That is what I say, it has been so long ago I may be mistaken on this drain being on the bottom. It may have been on the top.

"RDQ11. I show you Plaintiff's Exhibit No. 1, which you say is a drawing of a water system of the Isabella Plant, and again call your attention to the drawing which shows a 1 inch drain valve and see whether it refreshes your recollection as to where that drain valve was in the pipe with reference to [459] the water valve."

The Court: Mr. Lyon's objection is overruled.

"A. It appears to me that drain was up here.

"RDQ12. That is above the water valve?

"A. Yes."

That is all I wish to summarize from the redirect examination, your Honor.

The Court: Do you wish any more of his redirect to go in?

Mr. Neave: Yes, I want it all to go in.

The Court: I mean, does Mr. Lyon wish to read it at this time.

Mr. Lewis Lyon: No. I don't desire to read it at this time on the redirect.

On the recross examination I desire to have that all copied in the record. There are points in that which I believe should be called to the court's attention, but I believe that they can be summarized in argument as well as was the cross examination.

The material that I would like to point out at the present time is the testimony dealing with the temperature of the air in the chambers brought out on page 95, Question 35, or starting on page 94 with cross Question 33:

"RCQ33. Do you know the temperature of the pipes during defrosting? [460] "A. No.

"RCQ34. Do you know the temperature of the pipes when the air was blowing over them under the influence of the fan which was circulating the air through the system?

"A. I could not tell you the temperature of the pipes.

"RCQ35. Do you know what the temperature of the air was or have you ever measured that?

"A. I do not know.

"RCQ36. Have you any figures of the temperature of the air which left this system through the header pipe which is the large silver pipe at the head of the structure?

"A. I don't know."

With the offering of the entire recross examination, that is what I desire to call the court's attention to at the present time.

The Court: Very well.

EDWARD G. KENNEDY,

called as a witness on behalf of the Plaintiff, having been first duly sworn by Gertrude E. Ryan, Notary Public, testified as follows:

Direct Examination

By Mr. Neave:

DQ1. What is your full name?

A. Edward George Kennedy. [461]

DQ2. What is your residence address?

A. 13 Wible Street, Etna, Pennsylvania.

DQ3. What is your present occupation?

A. Maintenance engineer at Westinghouse High School.

DQ4. And that is in Pittsburgh? A. Yes, sir.

DQ5. Did you ever work for Carnegie Steel Company? A. Yes, sir.

DQ6. Were you employed by them from 1893 to 1915, December, 1915? A. I was.

DQ7. Did you ever work in the Dry Blast Plant?

A. I ran that plant when it was first put up.

DQ8. When was that, when you say, it was first put up?

A. About 1904, when they put it in operation. They started to build it in 1903. It probably went into operation about April or May, 1904.

DQ9. Will you give us a general description of what is in a Dry Blast Plant, what it consists of?

A. The purpose was to take the moisture out of the air used in the blast furnace, and get a dry, crisp air.

(Deposition of Edward G. Kennedy)

DQ10. What did the equipment consist of to reach this end? What did you have to get a dry, crisp air?

A. We had our compressors. We had two 225 ton York Machines and then we had our brine tank. Then we had our [462] cooling room. That is where the air went through these coils, these defrosting coils. The air went through them on to the top of the building to the blow engines and from the blow engines into the stoves and from the stoves into the furnace.

DQ11. Mr. Kennedy, when the plant was first put up, what was it that caused the refrigeration, the cooling? What did you use as a refrigerant?

A. That was direct expansion. We used all ammonia.

DQ12. How long did that last?

A. It might have lasted a month. I would not be positive but about a month. It blew up on the 29th day of May, 1904, on a Sunday afternoon. I will always remember that.

DQ13. What did they do to the plant after it blew up?

A. They turned around and put in the brine system, the brine tanks and coils, and they used this same room, the refrigerator room for the same purpose as what it was before. We pumped that brine in through these coils.

DQ14. When ammonia was used as the cooling medium, did you defrost the cooling coils? A. Yes.

DQ15. How was that done?

A. At that time, all you had to do was shut your expansion valves off on whatever coil was working. We had about 60 expansion valves in that room.

(Deposition of Edward G. Kennedy)

DQ16. When you used brine as a cooling medium, how did [463] you defrost at that time?

A. Well, we used water then. On the brine system we used water.

DQ17. Will you describe how water was used?

A. Up under your ammonia condenser there was a pan up there, I judge probably, I would not say positively, probably 18 or 20 inches deep, had a 6 inch line and that pipe ran from that down and outside of the building.

DQ18. From the pan under the condenser?

A. Yes. It was piped from there. Then we have this partitioned off in four compartments and there was a valve for every compartment.

DQ19. These valves that you are talking about, for every compartment, were on the water pipes?

A. Yes. That was water pipes.

DQ20. Going into the four compartments?

A. Yes. There was a pipe for each compartment.

DQ21. There was a valve on each pipe?

A. Yes.

DQ22. Will you continue?

A. Yes. You had a door down in the bottom underneath the coils to cut that part of the coils off, as many sections as were on that. You had a double door upstairs. You closed them. That cut that compartment off.

DQ23. When did you cut this compartment off? [464]

A. Whatever time he started to do his defrosting.

DQ24. That is, before defrosting?

A. Yes. He cut that off.

(Deposition of Edward G. Kennedy)

DQ25. When you closed these doors, could any air come through that compartment?

A. There might be a little come through. They never sealed it up tight; that is, not to my knowledge.

DQ26. What was done after these compartments were closed up?

A. He would turn around and open the valve on these brine coils and drain the brine out of these coils. Then he would turn around and go out and he would open the valve, the water valve on this compartment he was defrosting and there was a spray on that and that took your ice off.

DQ27. Took the ice off the brine coils?

A. Yes.

DQ28. What happened to the water from the melted ice?

A. That went down into the bottom into the well.

DQ29. Bottom of the cooling room?

A. Yes, into a well and we had a pump and we pumped that right back up on that ammonia condenser again.

DQ30. Where did the water come from originally?

A. Out of the river, river water. Of course you may wonder why it came out of the river but with 3 blast furnaces running Pittsburgh water wouldn't be a drop in the bucket [465] with what we had to pump.

DQ31. You have gotten us now so that the water is coming down over the brine coils to defrost. How long did it take to defrost?

A. That is something you could not answer. Everything in a plant like that was temperature. The hotter

(Deposition of Edward G. Kennedy)

the days, naturally it thawed off quicker and on colder days a little longer. Sometimes maybe your coil would build up more than it would others. You could not tell exactly how long it would take.

DQ32. What was the temperature of the cooling room before you started defrosting?

A. I could not tell you. That was way under freezing, way under freezing, when you started to defrost.

DQ33. Did you ever go into the cooling room?

A. Yes.

DQ34. Was it pretty cold?

A. You would put an overcoat on if you had one and if you hadn't you went without one and took a chance.

DQ35. When the frost had been taken off of the brine coils, what was the next operation?

A. Then you started your brine back into your coils and put that section in operation.

DQ36. Did you do anything with the doors at the bottom and top? [466]

A. Yes.

DQ37. What did you do?

A. You opened them up again.

DQ38. Did you do anything with respect to the water? What did you do with respect to the water in the pipes?

A. We shut that water off and opened the drain and drained that water out of there.

DQ39. Where was the drain?

A. Outside of the building. There was a platform on the outside of the building, outside of these coils was this 6 inch valve run along there and we would let it run down until there wasn't much there.

(Deposition of Edward G. Kennedy)

DQ40. How many drains were there there?

A. There was a drain on each pipe going into these and one drain at the end of the line. It was a blank flange. We had a valve on the end of that so if we forgot to drain one of them and opened that bottom it would drain the whole thing.

DQ41. These valves and the drain valves that you have referred to and the catwalk, where were they situated with respect to the cooling building?

A. Right on the outside of it.

DQ42. Was this catwalk outdoors or inside another building? A. It was outside.

DQ43. Outdoors? [467] A. Outdoors.

DQ44. I show you Plaintiff's Exhibit No. 1 and ask you if you can recognize this figure on the left of the drawing. A. What do you want here?

DQ45. Can you recognize this whole figure as of anything that you ever had seen before? Does it represent any structure that you have ever seen before?

A. These coils run along here.

DQ46. Coils in what building?

A. Coils in the defrosting building at the Isabella Furnaces. Here is your water line coming down here.

DQ47. The line on the left hand side of the drawing, outside of the building? A. Yes.

DQ48. And that runs up into the building?

A. Into the building.

DQ49. Where does it end up?

A. It ends up in this pan I was telling you about under the ammonia condenser.

DQ50. Inside the cooling building? A. Yes.

(Deposition of Edward G. Kennedy)

DQ51. Is the end of the line in the cooling building?

A. The end of the line is in the cooling building. This line here runs into the compartments.

DQ52. And the purpose of that is in order to spray— [468] A. Spray these coils.

DQ53. The brine coils?

DQ54. You were stating where this water came from.

A. It comes from the pan. There was a pan under the ammonia condenser up at the top of the building.

DQ55. What building?

A. That was right above your compressors.

DQ56. In the engine building?

A. In the engine building.

DQ57. I call your attention to the drawing on the left-hand side of the blueprint. It reads, "1 inch drain valve." What was that?

A. That was the valve, after you shut your water off your coils, that 1 inch valve was to drain that line, drain the line.

DQ58. What did it drain?

A. It drained what water was laying in that pipe.

DQ59. And did it drain the water that was inside of the cooler building? A. Not that line, it did not.

DQ60. Did it drain the water that was in the header on top of the coils? A. Yes, drained that down.

DQ61. I see on the left-hand side of the drawing, "6 inch water main." Where was the fifth drain valve in relation to that 6 inch water main?

A. The fifth drain valve was on the end of this line and that had a blind flange and it was drilled and there was a 1 inch drain put in there. That drain would drain

(Deposition of Edward G. Kennedy)

the whole thing. If you never open the other drains that would drain the whole thing.

DQ62. The line from the ammonia condenser coils?

A. Yes.

DQ63. You were head engineer in the blower room while you were there?

A. I was chief engineer, yes.

DQ64. And did the refrigerator room come under your supervision?

A. Yes. All the machinery they had out there came under me, all the blowing, the power house, electric plant and that.

DQ65. Was Mr. Brandt there while you were there?

A. Yes.

DQ66. Was Mr. William Swope?

A. Swope and I changed each other when they first started that. He ran one turn and I ran the other.

DQ67. When did this defrosting take place, during the daytime or at night?

A. It depended on the weather. At times they had to come out at night to do it. [470]

DQ68. Did you know Robert Taylor?

A. Bob Taylor, yes.

DQ69. Did you ever have an opportunity to become familiar with his hand writing?

A. He used to come in there day in and day out. If I saw his writing, probably I could tell you about it. Don't show me anything with his name or anything on it.

DQ70. I show you Plaintiff's Exhibits Nos. 2-A, 2-B, 3, 4, 5, 6-A and 6-B and ask you if you can recognize whose hand writing is on those exhibits.

A. That is Bob Taylor's.

No. 11642
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

REFRIGERATION ENGINEERING, INC., a corpo-
ration,

Appellant,

vs.

YORK CORPORATION, a corporation,

Appellee.

and

YORK CORPORATION, a corporation,

Appellant,

vs.

REFRIGERATION ENGINEERING, INC., a corpo-
ration,

Appellee.

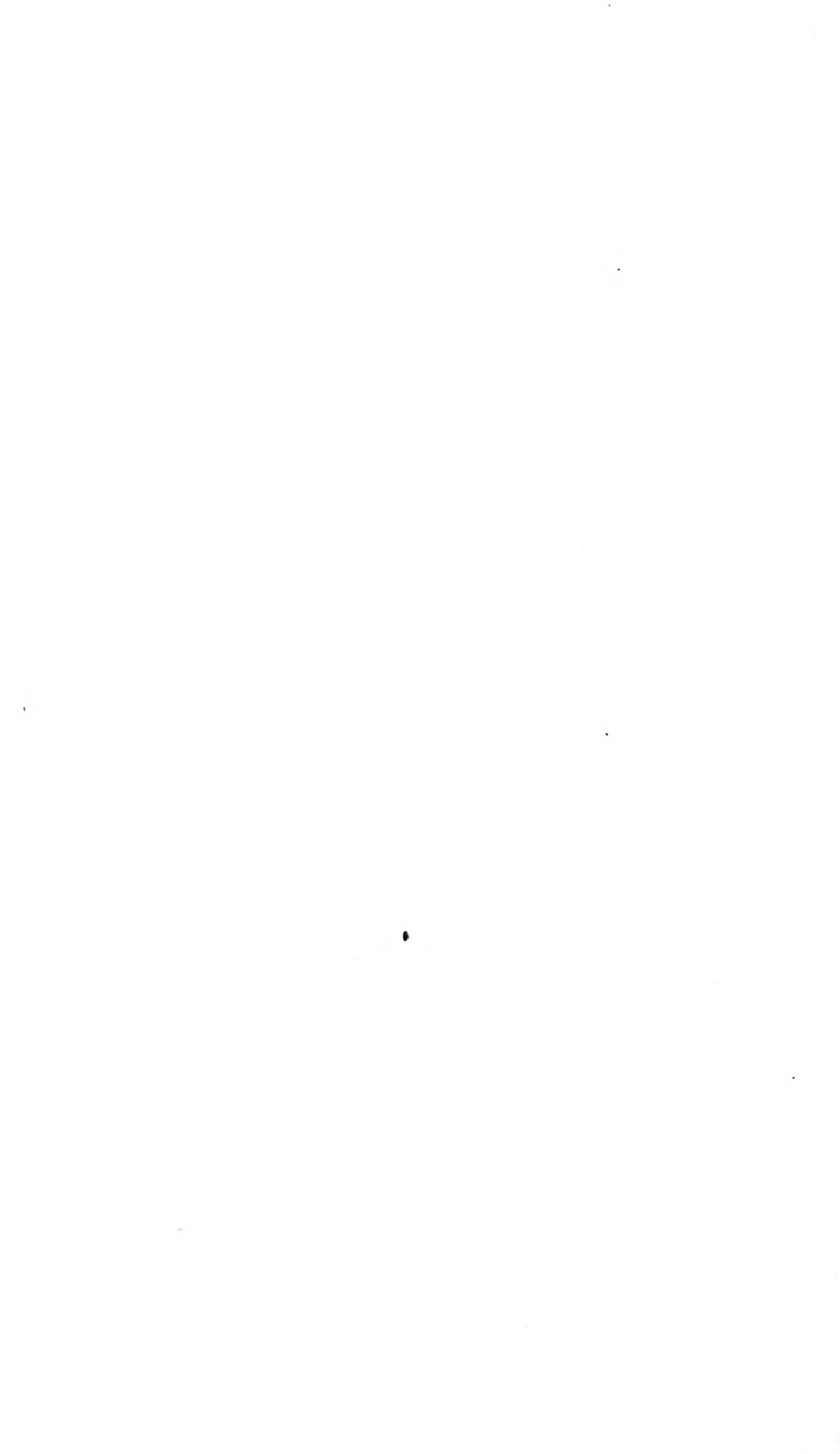
TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME II

(Pages 369 to 752, Inclusive)

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division



No. 11642
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FOR THE NINTH CIRCUIT

REFRIGERATION ENGINEERING, INC., a corporation,

Appellant,

vs.

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and

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Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

(Deposition of Edward G. Kennedy)

DQ71. Referring to Plaintiff's Exhibits No. 2-A and 2-B? A. Yes. That is all Bob Taylor's.

DQ72. Refer to Plaintiff's Exhibits No. 3, 4, 5, 6-A and 6-B. A. Yes. They are all Bob Taylor's.

DQ73. I show you Plaintiff's Exhibit No. 11 and ask you whether you recognize what that is a picture of.

A. That is the old Dry Blast.

DQ74. At the Isabella Furnaces?

A. At the Isabella Furnaces.

DQ75. Did you ever have any trouble with the water freezing inside of the cooling compartments?

A. Not to my knowledge. [471]

Cross Examination

By Mr. Lyon:

CQ1. Mr. Kennedy, this catwalk that you spoke about that was located outside of the engine room—

A. Outside of the coil room in what they called the refrigerating room on the end of the building.

CQ2. Was it inside or outside? A. Outside.

CQ3. Was it inside or outside of the engine room?

A. It was away from the engine room altogether because the coil room was on this side of the engine room and I think you had about sixty coils running across this room, that is, on the outside of this room.

CQ4. From the engine room, could you see this catwalk? A. No.

CQ5. Couldn't possibly see it? A. No.

CQ6. Here is Plaintiff's Exhibit No. 10, a model, Mr. Kennedy. This is supposed to represent the ammonia coils, these pipes that are on the right-hand—on your left-

(Deposition of Edward G. Kennedy)

hand—side of what appears to be a Masonite board.
Were those ammonia coils located in the engine room?

A. Up over the top of the engine room.

CQ7. Up over the top of the engine room?

A. Over the top of the engine room. [472]

CQ8. And this pipe—this pan, was that located in the engine room?

A. Up over the top of the engine room.

CQ9. This pipe came down through the engine room?

A. I think it came across the top of that outside, ran across this out to the end of this building, just where it shows you here.

CQ10. This pipe with this valve was not located in the engine room at all?

A. It was upstairs. As near as I can remember, it was upstairs.

CQ11. Inside or outside? A. Inside.

CQ12. It was inside above the engine room?

A. Under the roof.

CQ13. It was under the roof?

A. It was under the roof.

CQ14. It was of the same temperature or even higher than the inside of the engine room? A. Yes.

CQ15. That engine room was where you used to sit while you were on the job? A. Yes.

CQ16. That was kept warm? A. Yes.

CQ17. From that room this pipe led outside of the engine [473] room and down into the pan?

A. That part here, yes.

CQ18. That is, this horizontal silver portion which has a drain valve in red on the outer end of it?

A. Yes.

(Deposition of Edward G. Kennedy)

CQ19. There was no danger then of water freezing in this part of the pipe that was inside the engine room?

A. Not very much.

CQ20. But on the outside of the engine room, where this horizontal header pipe and these 4 stand pipes were out in the open, there was a good possibility that the water would freeze in those pipes in cold weather?

A. This valve here was always kept open.

CQ21. You mean you kept this end drain valve open?

A. Yes.

CQ22. Similarly, above each one of these valves which led to the spray headers there was a drain valve to drain that portion of the line which was above that valve?

A. This drain here?

CQ23. Yes.

A. To my knowledge, it was below this valve.

CQ24. And then this model is wrong in that it has a relief valve above the stand pipe—above rather than below it? A. Yes.

CQ25. Therefore, the operation would be to cut off this [474] valve leading to the stand pipe to stop the water from flowing through the spray header and then open the drain valve which was located on the other side and below that control valve?

A. To the best of my knowledge, yes.

CQ26. That drain valve then operated to drain only that portion of the line which was below the control valve to the spray header? A. Yes.

CQ27. You operated that system yourself, did you?

A. Yes, sir.

(Deposition of Edward G. Kennedy)

CQ28. Many times?

A. I operated that for quite a little while before I was sent over as chief engineer.

CQ29. You believe you know, when you say that drain valve was located in that position, what you speak of?

A. That has been so long ago that, you know, I could possibly be mistaken on that myself.

CQ30. You actually operated the system?

A. Yes.

CQ31. Is it an actual fact, Mr. Kennedy, that the reason this system was drained was because this whole pipe system outside of this plyboard structure and outside of this second plyboard structure was out in the open air and if you did not drain it because of freezing weather conditions you were liable to freeze up the whole system? [475]

A. There wasn't much chance so long as you kept that valve open.

CQ32. You were supposed to keep that open to avoid freezing it up? A. Yes.

Redirect Examination

By Mr. Neave:

RDQ1. You stated the temperature in the cooling room was below freezing. A. Yes, it was.

RDQ2. That was the normal condition, it was below freezing? A. Yes.

RDQ3. Did the water in any water pipes inside of the cooling room freeze up? A. No.

RDQ4. Why did they not freeze up?

A. The water pipes on the inside?

(Deposition of Edward G. Kennedy)

RDQ5. Yes. The pipes that showered water down.

A. That pipe coming over through the building from the—

RDQ6. I am talking now about the 2 inch pipes that have holes in them that showered—the spray pipes that showered water down on the brine pipes.

A. Yes.

RDQ7. Now, when the defrosting takes place, there is [476] water in those pipes? A. Exactly.

RDQ8. Now when they stop defrosting what happens to the water in those?

A. The pipes are set on such an angle that they drain themselves.

RDQ9. Then where does the water drain that is in the pipe itself?

A. Just as I say, it is up on an angle and it drains toward that spray all the time.

RDQ10. What about the water in the pipes that are above the valves that turn the water off and on? How do you drain the water out of those vertical pipes?

A. That is what I say, it has been so long ago I may be mistaken on this drain being on the bottom. It may have been on the top.

RDQ11. I show you Plaintiff's Exhibit No. 1, which you say is a drawing of a water system of the Isabella Plant, and again call your attention to the drawing which shows a 1 inch drain valve and see whether it refreshes your recollection as to where that drain valve was in the pipe with reference to the water valve.

Mr. Lyon: Objected to as leading and suggestive—grossly so. (Objection overruled)

A. It appears to me that drain was up here. [477]

(Deposition of Edward G. Kennedy)

RDQ12. That is above the water valve?

A. Yes.

RDQ13. Does that refresh your recollection as to where it was?

Mr. Lyon: Same objection as above, leading and suggestive. (Objection overruled)

A. Yes, above the valve.

RDQ14. Above the valve? A. Yes.

RDQ15. What water would drain through that drain valve?

A. If it was up on top of it, it would drain all the line.

RDQ16. All the line that was above it?

A. Yes.

RDQ17. What would you say was the temperature of the water that was used to defrost?

A. That is pretty hard to say what that water was because you know you have got that ammonia goes up into that condenser, you have to liquify it, naturally those coils are warm, that naturally would make that water a little warmer.

RDQ18. Have you any idea how long the water stayed in the pan underneath the coils?

A. There was water in that pan all the time.

RDQ19. It was a pretty large pan?

A. Yes. [478]

RDQ20. Would the water be cool to the touch?

A. That depends on the weather. That building was open there. There was lattice work.

(Deposition of Edward G. Kennedy)

RDQ21. What is your recollection about water from the river being added to the water that was sprayed over the condenser coils? Is that where you got the water from?

Mr. Lyon: Objected to as leading. (Objection overruled)

A. Yes.

RDQ22. You got water for spraying from the river?

A. We pumped it from a standpipe.

RDQ23. That is, water from the river was pumped into a tank? A. Yes.

RDQ24. And from a tank it was pumped over the coils?

A. Run to this well. Then a pump down underneath pumped it up.

RDQ25. Pumped up and then sprayed over the condenser coils? A. That is right.

RDQ26. And that river water came into the well?

A. Yes.

Recross Examination

By Mr. Lyon.

RCQ1. Mr. Kennedy, did you ever compare this drawing, Plaintiff's Exhibit No. 1, with the actual installation which [479] you testified you operated?

A. What drawing do you mean?

RCQ2. This blue print. Did you ever check this against the actual structure that you say you operated?

A. I never did.

RCQ3. Did you ever see this print before it was handed to you today? A. Never saw it.

RCQ4. Then your statement that this drawing indicates the drain valve above the main valve in these

(Deposition of Edward G. Kennedy)

headers is not in accordance with your recollection, is it?

A. Well, now, that is pretty long ago. It is pretty hard to just remember those things.

RCQ5. And you do not know anything about the accuracy of this drawing, do you? A. No, I do not.

RCQ6. Similarly, looking at this drawing, you note that the header pipe which goes across the top of the spray coils, which is titled "Water Spray 2 inch Pipe" is on a horizontal, isn't it? A. I think so.

RCQ7. In this drawing?

A. I can't see very well whether it is on the horizontal. I remember in actual practice it was elevated for a drain. [480]

RCQ8. You remember it was not like this drawing? It was not horizontal?

A. When they put a pipe in like that, they put it on a little elevation. Probably on a drawing like that, they would not show it. I don't know, of course. I am not a draftsman.

RCQ9. Did you ever put a level on that pipe?

A. No, sir.

RCQ10. Did you ever measure these header pipes to see whether they were on the horizontal?

A. Only by looking across it.

RCQ11. These header pipes were at the top of this, about 35 foot column?

A. I suppose it would be about 35 feet. I would not say definitely. I never measured that.

RCQ12. How did you obtain access to those pipes 35 feet above the base of these?

A. You came down a ladder to here and you were on a level with the ammonia condenser.

(Deposition of Edward G. Kennedy)

RCQ13. There was a top on top of these coils?

A. There was a roof.

RCQ14. There was a roof? A. Yes.

RCQ15. On the catwalk you couldn't see on the top?

A. You had to go up that ladder to the top of the building. [481]

RCQ16. How long were those pipes?

A. What pipes?

RCQ17. Those spray pipes.

A. I could not say definitely how long they were.

RCQ18. How far were they from the point where you could see them?

A. I would not say that. I could not just say how far it would be.

RCQ19. They weren't right in front of you?

A. No.

RCQ20. They were a matter of at least 15 or 20 feet away?

A. Well, some of them would be. Some would be closer.

RCQ21. How close was the closest?

A. Six or 8 feet inside the building.

RCQ22. You looked down on them when you looked at them, didn't you? A. Looked down on what?

RCQ23. You looked down on the spray pipes?

A. You looked across the spray pipes.

RCQ24. Referring to this model, Plaintiff's Exhibit No. 10, show me where you could look at the spray pipes above the coils.

A. You went inside and went up on your platform to the inside of your coils. [482]

(Deposition of Edward G. Kennedy)

RCQ25. There were platforms on the inside of these ammonia coils? A. Yes.

RCQ26. You went into this room from the bottom, you had a platform and you went into that coil system from the bottom and up a ladder? A. Yes.

RCQ27. Right through the coils?

A. Entering on the outside of the coils and going through an aisle say about as wide as this table all the way up to the top.

RCQ28. How high did the ladder go?

A. I could not give it to you in feet. I know when I stood up there I could look over the top of those coils.

RCQ29. You climbed that ladder yourself?

A. Yes.

RCQ30. How many times?

A. I could not tell you how many times. I did not do the defrosting.

RCQ31. You didn't defrost at all? A. No.

RCQ32. You don't actually know, Mr. Kennedy, of your own knowledge that the water was ever all drained out of these spray pipes?

A. We never had any trouble with the pipes, so it must [483] have been.

RCQ33. Do you know the temperature of the pipes during defrosting? A. No.

RCQ34. Do you know the temperature of the pipes when the air was blowing over them under the influence of the fan which was circulating the air through the system?

A. I could not tell you the temperature of the pipes.

(Deposition of Edward G. Kennedy)

RCQ35. Do you know what the temperature of the air was or have you ever measured that?

A. I do not know.

RCQ36. Have you any figures of the temperature of the air which left this system through the header pipe which is the large silver pipe at the head of the structure?

A. I do not know.

RCQ37. You remember, Mr. Kennedy, that connected with this water pipe was a steam pipe? A. Yes.

RCQ38. And wasn't that steam pipe there for the purpose of thawing out this water?

A. It was only put there as emergency. I never saw it used.

RCQ39. It was put on there for the purpose of blowing steam through that pipe if somebody should forget to open this drain at the end? [484]

A. The primary purpose of that—we admitted the water out of the river. We had no way of filtering that water. Naturally, we got mud, leaves, gravel and stuff like that and it would plug that up and that is primarily what that was put on there for, any sediment or anything that was in the lines which we used to get a terrible lot of; leaves would come up there some times, gravel, slime, mud.

RCQ40. You never saw that used at all?

A. I never seen it used, no.

RCQ41. You stated that temperatures were taken in the cooling compartments while refrigeration was going on? A. Yes.

RCQ42. Do you recall at what points those temperatures were taken in the compartments?

A. No. I do not mind that.

(Deposition of Edward G. Kennedy)

Mr. Neave: The next on the same prior use, your Honor, is that of Edward Leo Harkins, and I would like to have the entire direct examination copied into the record.

Mr. Harkins was the man who actually did the defrosting in this same installation. In the first few pages he identifies the installation and describes it and corroborates the other witnesses, and then on page 102—

Mr. Lewis Lyon: I think that is argument, your Honor.

The Court: You mean he corroborates it only as to the [485] physical structure?

Mr. Neave: As to the structure; yes.

The Court: And that is what you intended to mean by your statement of corroboration?

Mr. Neave: That is what I intended to mean. He is stating the same things.

Q. "DQ46. Perhaps you better tell us just what you did do. (This is direct to what he actually did when he was defrosting.)

"A. I shut the main off first, went out and opened my drains on the 6 inch pipe, this 6 inch header I should call it going up to the header.

"DQ47. Where were those drains located?

"A. Right above the gate valve.

"DQ48. Inside or outside?

"A. Outside of the cooling building.

"DQ49. Where with relation to the catwalk?

"A. The catwalk was right where we turned this valve. That is what it is for. The catwalk set up off the fan room about 6 feet. The fan room was down underneath that catwalk.

(Deposition of Edward G. Kennedy)

“DQ50. You closed off the water as I understand it, the water valves, and then you say you opened the drain valve which was above the water valve on the riser?”

“A. Right.

“DQ51. What did that do when you opened that drain valve? [486]

“A. Drained your header out. It was inside your coil room and it came back and drained out all these drains and you could leave the drain open if you wanted to. You would not have to leave it closed. I left it open winter and summer. At the head there was a drain at the head of this line. It I opened also after I was through and took the brine out of the—took the water out of the pipe; that was laying practically pretty near level.

“DQ52. That was the 6 inch supply pipe?”

“A. That is it.

“DQ53. That supplied the 4 upright pipes that led to the individual compartments? “A. Yes.”

Then he goes on to describe what he did next after draining the water system, about opening up the doors and starting the refrigeration system.

The Court: Let me see now, on page 104, Question 60: “How often did you do this?” Is he talking about defrosting there?

Mr. Neave: Yes, the whole cycle of defrosting, taking the brine out, defrosting it, and putting it back into operation.

The Court: They took a different one each day?

Mr. Neave: That is right. There were four compartments.

May I call your Honor's attention to Question 67, par-[487] ticularly Question 70, about the temperatures.

The Court: Very well.

Mr. Neave: That is all I wish to summarize of the direct examination.

The Court: Mr. Lyon?

Mr. Lewis Lyon: I will ask him the entire cross examination be copied in the record at this time.

The Court: On page 110 there appears to be some testimony of this witness on cross examination concerning the platforms on the inside of the cooling rooms. There has been no testimony on that. I don't know whether it is material or not.

Mr. Neave: I don't think that it is material, your Honor, but there is a description of it in the testimony itself, and I think that the platforms are shown in the inside of this model.

The Court: Yes. I noticed them yesterday.

Mr. Lewis Lyon: As in the case of the previous witness, I call your Honor's attention to the cross examination on page 113, which is merely corroborative of the other witnesses. They did not measure the temperature of the air at any time, or this witness didn't as he states on cross question 33:

"CQ33. Did you ever, at any time, measure the temperature or put a thermometer in and measure the temperature of [488] the air at the top of these coils?

"A. No. Hughie Smith did that once and I seen him do it myself but I did not get the temperature off him."

I would also call your Honor's attention to a portion of the direct examination, particularly that beginning on page 99, through Questions 24 to 38 inclusive, which describe the complete isolation of these chambers or cells during defrosting. I can read that if you wish.

The Court: It is in the record and I am reading it.

I still do not understand this description, how he got into the separate compartments which went crosswise there.

Mr. Neave: There is a ladder, I believe, that went up inside.

The Court: The ladder is on the other side?

Mr. Neave: I don't think it is shown in this model.

The Court: The ladder that came in here?

Mr. Neave: Yes, I believe so, and that went up from the inside. Then there were platforms like floors in each story so that they could get at the pipes.

The Court: I do not recall any testimony either about what became of the slush or waste.

Mr. Neave: I think that they testified that that went down into the cellar and was pumped back over the condense rcoils.

Mr. Lewis Lyon: Pumped back over the hot ammonia coils [489] and circulated back again.

Mr. Neave: And additional water came in from the river at the same time.

The Court: How did they get in to open this door?

Mr. Neave: They had to go to the ladder and climb up on top of the coils.

The Court: I think I understand it.

EDWARD HARKINS,

called as a witness on behalf of plaintiff, having been first duly sworn by Gertrude E. Ryan, Notary Public, testified as follows:

Direct Examination

By Mr. Neave:

DQ1. What is your full name?

A. Edward Leo Harkins.

DQ2. What is your residence address?

A. 6046 Sawyer Street, Pittsburgh, Pennsylvania.

DQ3. By whom are you employed at present?

A. Government, Pittsburgh Ordnance.

DQ4. That is in the Chamber of Commerce Building?

A. Chamber of Commerce Building.

DQ5. Were you ever employed by Carnegie Steel Company? A. From 1904 to around 1917. [490]

DQ7. Did you ever work at the Dry Blast plant of the Isabella Furnaces? A. Yes.

DQ8. What was your work there?

A. Helping the engineer out.

DQ9. In the engine room?

A. In the engine room.

DQ10. And later what was your occupation?

A. Later I got on the thawing off, i.e., defrosting the coils.

DQ11. That is defrosting the brine coils of frost?

A. Yes.

DQ12. Do you recall what years you were the coil tender?

A. I was only on there about a year or so. I just don't recall the year. I could not say for sure.

DQ13. It was before 1917?

A. Yes, before 1917.

(Deposition of Edward Harkins)

DQ14. Was it before the last war?

A. It would be around 1915, I would say.

DQ15. Did you do the actual defrosting during that period.

A. Yes.

DQ16. Who was in charge of the Dry Blast Plant during that time?

A. Bruce Walter and Bob Taylor at that time. [491]

DQ17. Was Mr. Swope or Mr. Brandt there?

A. Mr. Brandt and Mr. Smith was there, Hughie Smith.

DQ18. Do you know whether Mr. Smith, Mr. Walter and Mr. Taylor are alive?

A. No. I think Walter and Taylor are dead, both of them.

DQ19. What about Mr. Smith?

A. Mr. Smith is dead.

DQ20. When you were the coil tender—is that what you called it?

A. Yes.

DQ21. When you were coil tender, in what years did you say you thought you were coil tender?

A. Around 1915.

DQ22. Do you recall whether it was before the last war?

A. That was after the last war.

DQ23. After the last war?

A. Wait a minute. It was not. I did not work there after the last war. I am mistaken on that. It was before the last war because I was working for them at that time.

DQ24. Will you describe the operations you went through as coil tender?

A. You mean the first thing in the morning when I come out?

(Deposition of Edward Harkins)

DQ25. That is right.

A. The first thing I done was went in and shut the [492] brine off and shut the doors at the top of the coil, the hanging door, see that they were shut and the valve shut off. Come down—

DQ26. These doors that you speak of, did you shut them in all four of the compartments?

A. No. Just the one compartment we were thawing off. Then I went down and opened the valve at the top of the brine coil. Then I went out and started up my pump and that pumped it back into the storage tank.

DQ27. Was there any door to shut off the air at the bottom of the compartment?

A. Yes. There were two doors we closed on that certain section. We left the others open. There were four partitions there and there were four doors and the one we was going to thaw off we shut them doors. The same way with the valve, we opened the valve and pumped it out.

DQ28. After you had pumped out the brine from the brine coils, what did you do next?

A. Went up the ladder and opened the valve on the main water line.

DQ29. What ladder is this?

A. On the inside of the engine room because the valve was right at the top of the ladder.

DQ30. That is the water valve?

A. Yes. We opened that to the section we was thawing [493] out. We opened that valve that run up into the headers of that coil.

(Deposition of Edward Harkins)

DQ31. Where was the second valve that you are talking about?

A. The first one was the main one. The next one was the coil we was thawing off.

DQ32. And was that inside the engine room or outside? A. That was on the outside, the coil valve.

DQ33. How did you get to the place where this second valve was on the individual pipe that went up to the refrigerating room?

A. They had a catwalk. There was a door at the top of the ladder and that catwalk came out and ran in the engine room right where we came out the ladder. Then we went out on that catwalk to open the other valve.

DQ34. When you had these two water valves open, what happened to the water then?

A. It went into the coil that we was draining off and that went down over this coil into the cellar, ran down into the cellar and out in a well.

DQ35. Then where did the water go from the well?

A. That was pumped back up again over the condenser coils.

DQ36. Did any other water go into this well other than the water that came down from the drainage? [494]

A. We had water coming from a stand tank on the outside. I figure that stand tank was about 75 to 85 feet high or more.

DQ37. In the outdoors? A. Outdoors, yes.

DQ38. Where did the water come from that was put into the standpipe?

A. Pumped up by a pump house from the river.

(Deposition of Edward Harkins)

DQ39. I don't think you told us where the water came from that was in the pipe that led over the coils, the brine coils.

A. That came from a tank that we had under the coil system, the condenser upstairs. There was a pipe ran up there and it came from that tank down to this valve.

DQ40. These condenser coils and the tank under them, where were they placed with relation to the engine room?

A. I don't get that.

DQ41. Where was the condenser coil with respect to the engine room?

A. That was right above the engine room. We had to go up a flight of stairs to get up there. I would say that was anyhow in the neighborhood of about, I guess the engine stood about 40 feet or something like that off the ground, and then this pan that was a water can to catch the water that came off the condensers upstairs.

DQ42. That was fairly sizeable?

A. I will say it was a pretty large pan. I will figure it was about anyhow, it was 20 feet in width and over all in length of about 75 feet even longer.

DQ43. Do you recall how deep?

A. Eighteen inches anyhow, even more.

DQ44. How long would you keep the water running down over the brine coils?

A. Well, some days it would be longer than others. I figure a day like this it would take at least 2 hours running steady over the coils.

DQ45. When you had completely defrosted, what did you do then?

A. Went back over the same routine only reversed it.

(Deposition of Edward Harkins)

DQ46. Perhaps you better tell us just what you did do.

A. I shut the main off first, went out and opened my drains on the 6 inch pipe, this 6 inch header I should call it going up to the header.

DQ47. Where were those drains located?

A. Right above the gate valve.

DQ48. Inside or outside?

A. Outside of the cooling building.

DQ49. Where with relation to the catwalk?

A. The catwalk was right where we turned this valve. That is what it is for. The catwalk set up off the fan room about 6 feet. The fan room was down underneath that catwalk.

DQ50. You closed off the water as I understand it, the [496] water valves, and then you say you opened the drain valve which was above the water valve on the riser?

A. Right.

DQ51. What did that do when you opened that drain valve?

A. Drained your header out. It was inside your coil room and it came back and drained out all these drains and you could leave the drain open if you wanted. You would not have to leave it closed. I left it open winter and summer. At the head there was a drain at the head of this main line. It I opened also after I was through and took the brine out of the—took the water out of the pipe; that was laying practically pretty near level.

DQ52. That was the 6 inch supply pipe?

A. That is it.

DQ53. That supplied the upright pipes that led to the individual compartments?

A. Yes.

(Deposition of Edward Harkins)

DQ54. After draining the water system, what did you do next? A. I went and opened up the doors.

DQ55. Which doors.

A. The solid doors in the cellar. Then I closed my valve at the bottom, the one I was using for pumping out and went out the top.

DQ56. Brine valve? [497]

A. Brine valve. We had had a little pump there to pump that out while we were thawing off. When we finished that we generally closed that and the doors were opened. That left air come through there. Then went up on top and opened the brine valve on top so as to fill the coils again. Then I opened the doors for the blow engines to pick up.

DQ57. You opened the doors at the top?

A. Yes.

DQ58. As well as at the bottom? A. Yes.

DQ59. Was that your entire cycle of operation?

A. Yes.

DQ60. How often did you do this?

A. Once a day. First thing in the morning when I came out.

DQ61. Did you do it for the same compartment each time?

A. No, not for the same compartment. Took a different one each day. Took No. 1 today, No. 2 tomorrow, No. 3 the next day, No. 4 the next day and started back on No. 1.

DQ62. Did you defrost during the day or at night?

A. Defrosted during the day. Never was on night turn.

(Deposition of Edward Harkins)

DQ63. Did the plant operate during the wintertime?

A. Yes.

DQ64. And did you defrost during the wintertime?

A. Yes. [498]

DQ65. Were there some days during the wintertime when you did not operate the plant or when you changed your routine any?

A. The plant would operate all right but we would shut the compressors down when it would come down so far that it was just according to the moisture.

DQ66. In the air?

A. In the air. It got down so far we did not need it. We shut the compressors down until we got another reading.

DQ67. Did you take any temperature readings in the various cooling room compartments?

A. No. I did not.

DQ68. Were you ever in the cooling room yourself?

A. Yes.

DQ69. Were you in the compartments which were in operation? A. Yes.

DQ70. How cold would you say it was in there?

A. Anyhow below freezing point because it had to be. If it wasn't below freezing point, your pipes would thaw off regardless. I would say anyhow it was around 30, 28 or 30, sometimes far colder than that.

DQ71. What is your best recollection of the temperature of the water that was used for the defrosting?

A. I could not say that. I never took the temperature [499] of that at all. I don't know even if they took the temperature of it.

(Deposition of Edward Harkins)

DQ72. It wasn't hot though?

A. It wasn't hot. We wasn't allowed to use the hot water.

DQ73. I show you Plaintiff's Exhibit No. 1 and referring to the drawing on the left-hand side of this Exhibit, do you recognize that as a blueprint of any device that you have seen, any structure you have seen?

A. Yes.

DQ74. What is it?

A. These are the valves I am talking about closing off.

DQ75. What is this structure?

A. This is the coil room.

DQ76. Where? A. In the freezing room.

DQ77. Of the Isabella Furnaces? A. Yes.

DQ78. Could you trace for me on here the water pipe lines?

A. Our catwalk was out here. Wait a minute.

DQ79. This pipe here says, "6 inch brine feed."

A. This is the front. This is the platform. These are the doors.

DQ80. What platform. Are these inside of the building? [500] A. Yes, inside.

DQ81. How did you get up to these platforms?

A. By a ladder. There was a ladder all the way up.

DQ82. What are these pipes in the middle here?

A. Looks like coil room to me.

DQ83. Brine coils? A. Yes.

(Deposition of Edward Harkins)

DQ84. On the left-hand side of this drawing, there is a mark, "6 inch water main." What would that be from your recollection of that installation?

A. That is the one that ran along the catwalk. Your catwalk ran along here. You handle these valves off your catwalk.

DQ85. What is this 6 inch gate valve?

A. That ran up to your header, up inside of your coil room.

DQ86. Then just above the 6 inch gate valve, there is marked, "1 inch drain valve"? A. Yes.

DQ87. Was that the way it was on the actual structure?

Mr. Lyon: Objected to as leading—grossly so.

A. Yes. There were four of these.

DQ88. Four of these?

A. Yes. Four compartments on each side, four of these.

DQ89. One for each compartment? [501]

A. One for each compartment.

DQ90. Do you recall what the size of the spray pipe was from the coils?

A. Do I recall, you mean these drip pipes?

DQ91. That is right. A. Two inches.

DQ92. Two inch pipes? A. Yes.

DQ93. Did you at any time during your operation of the defrosting cycle have any difficulty in defrosting the pipes because of water freezing inside of the refrigerator room? A. I never had no trouble.

DQ94. Do you remember how many of these drip pipes, as you call them, there were in each compartment?

A. I would not say that because I never counted them.

(Deposition of Edward Harkins)

DQ95. Quite a few?

A. Quite a few because there was one from each coil.

DQ96. Each set of coils? A. Yes.

Cross Examination

By Mr. Lyon:

CQ1. Did you ever see this drawing before, this blueprint that is in front of you?

A. Not that I know of.

CQ2. Did you, at any time, ever make a comparison between this drawing and what is shown on it and what you say you worked on at the Isabella Furnace plant? A. I don't get you on that.

CQ3. Did you ever compare what is shown on this drawing with what actually existed at the Isabella Furnace plant? A. Yes, there is lots of things shown.

CQ4. Did you, at any time, make an actual comparison of what is shown on this drawing with what was at the Isabella Furnace plant?

A. I made it in my noodle. I didn't draw it.

CQ5. You don't remember ever seeing this particular drawing before it was shown to you here?

A. I do not remember.

CQ6. The first time you actually saw it was when it was presented here at this hearing?

A. Yes, that I know of.

CQ7. You are pretty sure that what is shown on the drawing, Plaintiff's Exhibit No. 1, is just what you recall it to have been at the Isabella Furnace plant?

A. I would not say that either because I told you the reason why it has been so long. I do not keep tag on every place I work and every little thing I do.

(Deposition of Edward Harkins)

CQ8. You are not sure?

A. I could not say it was a correct drawing. I could not say that. There may be some little change in it or some- [503] thing.

CQ9. However, this spray system that has been pointed out to you, are you certain it is correctly shown on this drawing? A. Yes, as much as my knowledge.

CQ10. Inside of these cooling rooms, there are one, two, three platforms? A. Yes.

CQ11. How far apart were those platforms?

A. You mean how high?

CQ12. What was the difference in height?

A. I judge about—I don't know, about three feet above my height. I am 5 foot 4 inches. About 8 feet.

CQ13. About 8 feet? A. Yes.

CQ14. How far was the top of this platform from the top of the coils?

A. From the top of the coils, what do you mean?

CQ15. The coils are shown on this drawing as extending up to a point which I will mark by "A" on Plaintiff's Exhibit No. 1 for identification? A. Yes.

CQ16. The platform immediately below that I will mark "B." How far was that platform "B" below the top of the coils?

A. Practically, pretty near the same distance, around [504] 8 feet.

CQ17. So that standing on that platform, you could not see the top of the coils?

A. Wait a minute. I was up on them coils every day while I was working there. I had to go up there to close these doors. They had zinc doors there.

(Deposition of Edward Harkins)

CQ18. You went up the ladder?

A. We had to go up a ladder.

CQ19. And the doors are represented by what I have marked with an arrow as "Door," are they not?

A. Doors. There was a door in each compartment.

CQ20. That is one I have marked?

A. This is a door here, this is a door here, in each compartment.

CQ21. This is the door that closed up over the outlet?

A. No. I see what you mean. You mean the door that went—set in the center of the coils like the blowing engines took the air up there. Them doors, when them doors were closed there would not be any way to go up there.

CQ22. Doesn't this indicate one of the doors?

A. No.

CQ23. Where are they?

A. Right in the center.

CQ24. Where did you go to close those doors?

A. On top of the water sprinkler. [505]

CQ25. Is the position of that water sprinkler correctly indicated in Plaintiff's Exhibit No. 1?

A. Well, I don't just exactly remember that. I know they was above your freezing coil and we had to walk on them anyhow to go over to close these doors.

CQ26. You don't remember how they were positioned above the coils, how the spray pipes were positioned above the coils?

A. You mean the holes in them or just how high are they off the pipe?

(Deposition of Edward Harkins)

CQ27. Yes, that and any other details.

A. I figure they was about 4 inches or so off your freezing pipe.

CQ28. Remember anything else about them?

A. They had drains in them. There was holes all along these pipes so the water would come down over your coils.

CQ29. Now, you climbed up a ladder which is inside this room, of course, when the air was off; you were not in when it was blowing through.

A. Yes, every day.

CQ30. When air was blowing through?

A. We had to. The reason why, these compartments here, we had to go through 4 compartments like that to get to this ladder that set in back. This is where you enter the freezing room. The ladder set right up in that corner. You [506] had to go through this compartment to get over to your ladder. If you thawed No. 1 off, you would have to come back again to get to No. 1 coil again.

CQ31. You walked through there and got up on top of these coils to close the doors?

A. Yes, and to close this valve here and open it.

CQ32. After you did that, you went back down here and closed the bottom door?

A. Yes. You had to keep these doors closed all the time to keep the air from blowing out.

CQ33. Did you ever, at any time, measure the temperature or put a thermometer in and measure the temperature of the air at the top of these coils?

A. No. Hughie Smith did that once and I seen him do it myself but I did not get the temperature off him.

(Deposition of Edward Harkins)

CQ34. Isn't it a fact that one of the objects of blowing air through these coils was to get the water out of the air?

A. Yes, the moisture out of the air. That was the idea.

CQ35. And any water continually dripping from these spray heads back into the air would put water back into the air, wouldn't it?

A. No, because this section was cut off.

CQ36. I mean when you turned the air on again.

A. Yes. [507]

CQ37. And if you left water in this spray header pipe that water would drip back into the air again?

A. No. That is what we used this drain valve for here that is along your catwalk. We drained that out. That would drain this out.

CQ38. It would not remain in that pipe to drip into the air? A. That is right.

CQ39. If you did not open this drain, as you have just testified, the water would remain?

A. No. It would not because it would drip out.

CQ40. It would drip into the air and your air would pick up the water? A. Yes.

CQ41. Did you yourself, at any time, measure the temperature of the air passing through this coil at any point? A. No, I did not.

CQ42. You spoke, Mr. Harkins, about there being a drain valve at the end of this header pipe?

A. Yes, sir.

CQ43. You always opened that drain valve and left it open after each operation?

A. I could. It would not hurt anything.

(Deposition of Edward Harkins)

CQ44. You did leave it open?

A. Yes. I did it often. [508]

CQ45. At the same time this valve at the header here where it came down off the tank and ran into the well, there was a valve right at the top of the ladder, the main valve that was closed first, then, by leaving this drain open it would take the water in the main line out so it would not freeze?

A. These pipe here were covered, insulated.

CQ46. You got all the water out of this header pipe so it would not freeze?

A. Yes, so you wouldn't have any trouble the next time.

CQ47. That header pipe was located outside the building?

A. Yes, sir.

CQ48. Not in the cooling room?

A. Not in the cooling room, no.

Redirect Examination

By Mr. Neave:

RDQ1. I forgot what you stated you did to the drain valves before you turned the water on when you were going to defrost.

A. I closed them the first thing before I opened the valves at all. I could open the valve all right. It would not hurt nothing.

RDQ2. You closed the valve before you turned on the water?

A. I could of left it on. It wouldn't hurt nothing [509] because that ran away. Didn't hurt anything by running.

(Deposition of Edward Harkins)

RDQ3. Waste a little water?

A. Yes, waste a little water. That is all. [510]

Mr. Neave: Now this deposition closes the depositions on the Carnegie Steel Company use in Pittsburgh. I will now offer Exhibits 1, 2-A, 2-B, 3, 4, 5, 6, and 6-B. Exhibits 7 and 8 I shall offer later.

The Court: Exhibit 1 is the diagram?

Mr. Neave: Exhibit 1 is the diagram.

The Court: 2-A, 2-B, 3, 4, 5, 6-A and 6-B are the letters?

Mr. Neave: Are the letters, and that is all that is being offered at the present time. Exhibits 7 and 8 were identified by one of the witnesses but concerns another use about which another witness later on in Chicago testified to, and I shall offer it at that time.

The Court: Very well.

Mr. Neave: I will also offer Exhibit 10, which is the model.

The Court: And Exhibit 11, the photograph?

Mr. Neave: Yes, and Exhibit 11, the photograph.

The Court: Exhibit 12 is Swope's letter and his deposition isn't offered?

Mr. Neave: That is right, so I am not offering that.

The Court: Admitted.

(The exhibits referred to were received in evidence and marked Plaintiff's Exhibits 1, 2-A, 2-B, 3, 4, 5, 6-A, 6-B, 10 and 11, respectively.) [511]

[Note: Plaintiff's Exhibits Nos. 1 to 6B and 11 will be found in the Book of Exhibits at pages 1117 to 1124 and 1126.]

Mr. Neave: The next series of depositions, your Honor, are relating to a sale of a refrigeration equipment by Hayes Brothers, in Indianapolis, and the sale was made to the Polar Ice & Fuel Company in the same city, who ran an ice distributing plant and who subleased this plant to others to run it. It was one of these plants where they have 10-cent and 25-cent pieces of ice which they sell with an automatic means of dispensing.

I suggest that the stipulation be copied into the record, which is on pages 5 and 6 of the deposition.

Now, your Honor, I would like to read the entire deposition of Mr. Barton, who is the first witness.

The exhibits pertaining to this use are Exhibits 13 to 29 in your Honor's book. [512]

STIPULATION

It is stipulated by and between the parties by their counsel:

1. That the hearings in Indianapolis are held pursuant to notices served upon the defendant and now before the Notary, Mr. Norman E. Metcalf.

2. That the provision of Rule 26(a) of the Federal Rules of Civil Procedure that depositions taken prior to service of answer shall be by leave of the Court, is hereby waived.

3. That the witnesses shall be sworn by Mr. Norman E. Metcalf, who is fully qualified under the provision of Rule 26, section (2) and (c) of the aforementioned Rules.

4. That the testimony given here shall be taken stenographically and transcribed by Mr. Norman E. Metcalf.

5. That the testimony, when transcribed, shall be submitted to the witness for examination and shall be read to or by him, and any changes in form or substance which the witness desires to make shall be entered upon the deposition by Mr. Norman E. Metcalf, with a statement of the reasons given by the witness for making them.

6. That the signing of the depositions as read and corrected by the witness is hereby waived.

7. That Mr. Norman E. Metcalf, after duly certifying the depositions, shall send them by registered mail to the Clerk of the District Court of the United States, Southern [513] District of California, Central Division, for filing.

8. That the cost of the original transcript, exhibits, attendance fees and notary's fees shall be borne in the first instance by plaintiff, but shall be eventually charged as taxable costs to the losing party.

FRED C. BARTON,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, relating to said cause, deposes and says:

Direct Examination

By Mr. Neave:

1Q. What is your full name?

A. Frederick Cornell Barton.

2Q. What is your residence address?

A. 1734 North Meridian Street.

3Q. Indianapolis?

A. Indianapolis, that is right.

4Q. Who are you working for at present?

A. I am supervising mechanical engineering of Allison. Plant 5, Division of General Motors.

(Deposition of Fred C. Barton)

5Q. Where is that?

A. That is located at Maywood, Indiana.

6Q. Were you ever employed by Hayes Brothers, Incorporated of this city? A. Yes, I was. [514]

7Q. When were you employed by them?

A. 1931 through 1936, inclusive.

8Q. What was your work with Hayes Brothers?

A. I was sales engineer in charge of refrigeration, sales, engineering and installation.

9Q. While you were employed by Hayes Brothers did you do any work for the Polar Ice & Fuel Company of Indianapolis? A. Yes, I did.

10Q. I show you a photostat of a letter on the letter-head of Hayes Brothers, dated January 18, 1934 to Polar Ice & Fuel Company, signature being F. C. Barton, and ask whether you can identify the letter?

A. Yes, I can. This is a letter which constitutes a proposal from Hayes Brothers to the Polar Ice & Fuel Company covering a refrigeration installation in their ice storage sales room at 10th and Tacoma, Indianapolis, Indiana.

11Q. Do you recognize the signature to this letter?

A. Yes, sir, that is my signature.

12Q. What was the function of the service station, ice storage station, located at 10th and Tacoma?

A. The function of that station was a storage to keep ice at a temperature below melting where it could be sold through an automatic ice dispenser to the public.

13Q. Was the proposal contained in this letter ever accepted? [515] A. Yes, sir, it was.

14Q. I show you a photostat of an order marked 11749, and ask you whether you recognize it. Before

(Deposition of Fred C. Barton)

you answer that question I want to ask the Notary to mark for identification as Plaintiff's Exhibit 13, the Hayes Brothers' letter of January 18, 1934.

Mr. Neave: Will the reporter please read the last question?

(Question No. 14 read by the Notary.)

A. Did you say 11749?

15Q. Yes, Order Number.

A. Yes, I recognize this as being a purchase order from Polar Ice & Fuel Company accepting my proposal dated Jan. 18, 1934 for the refrigeration installation in their Tacoma and 10th Street plant. That is Tacoma and East 10th.

Mr. Neave: I will ask that the Polar Ice & Fuel Company Order Number 11749 be marked as Plaintiff's Exhibit No. 14 for identification.

16Q. Will you state whether or not the equipment mentioned in Plaintiff's Exhibits 13 and 14 was ever installed in the Polar Service Station?

A. Yes, sir, it was installed.

17Q. I show you what appears to be a photostat of a bill, No. R1155, dated 3/31/34, and ask you whether you can identify what it is. [516]

A. Yes, sir. This is a Hayes Brothers' invoice for payment of refrigerating installation in the Tacoma and East 10th Street plant of Polar Ice & Fuel.

18Q. I notice that on this page there is mentioned the Order Number 11749. I will ask you whether that is the Polar Ice order, Plaintiff's Exhibit 14?

A. Yes, sir, that is the same order.

Mr. Neave: I will ask that the Hayes Brothers' bill be marked Plaintiff's Exhibit 15 for identification.

(Deposition of Fred C. Barton)

19Q. I show you what appears to be a photostat of a bill of Hayes Brothers, No. R1156, and ask you if you can identify it.

A. Yes, sir. This is an invoice from Hayes Brothers to Polar Ice & Fuel Company covering the difference in cost between a capacitor type motor and a split phase motor that was furnished and installed in place of the original motor in the Tacoma and 10th Street plant of Polar Ice & Fuel.

20Q. Why was this change made in the installation?

A. This change was made at the request of Polar Ice & Fuel because the split phase motor caused radio interference and the capacitor type motor eliminated that interference.

Mr. Neave: I will ask that this bill No. R1156 of Hayes Brothers be marked as Plaintiff's Exhibit No. 16 for identification.

21Q. Will you state whether or not this installation was made [517] prior to the dates of these bills, Plaintiff's Exhibits 15 and 16?

A. Yes, sir, the installation was made prior to those dates.

22Q. Can you describe to me what this installation consisted of?

A. Yes, sir. This installation consisted of a McQuay unit cooler suspended in one corner of the ice storage room, and connected through suitable refrigerant piping to a Frick methyl chloride combined refrigerating unit installed outside the storage room in a lean-to structure.

(Deposition of Fred C. Barton)

23Q. What did you have to do personally with this job?

A. I made the original contact with Mr. Lamar.

24Q. Who was Mr. Lamar?

A. Chief Engineer of Polar Ice & Fuel, to try to obtain this business. At Mr. Lamar's request, I measured the installation, inspected insulation, calculated heat loss, and designed the refrigeration installation. I made additional contacts with Mr. Lamar which resulted in obtaining requisition covering this installation. I then purchased necessary equipment, made necessary sketches, supervised the entire installation, testing, balancing, and placing same in operation.

25Q. Who did the actual work of installation under your supervision?

A. Mr. Herbert Hayes was our erection engineer on that [518] job.

26Q. Were the Hayes Brothers' bills paid promptly for this work? A. They were not.

27Q. Why not?

A. The installation was unsatisfactory.

28Q. I show you photostat of a copy of a letter dated May 2, 1934 from Polar Ice & Fuel Company to Hayes Brothers, and ask you whether you recognize it?

A. Yes, sir. This was a letter to Hayes Brothers from Polar Ice & Fuel Company confirming Mr. Lamar's conversation that the refrigeration installation in the Polar Ice Station at Tacoma Avenue and 10th Street was unsatisfactory and that we were requested to remove same at once.

29Q. Is the letter written to your attention?

A. Yes, sir.

(Deposition of Fred C. Barton)

30Q. You remember having received it?

A. Yes, sir, I do.

Mr. Neave: I ask that it be marked as Plaintiff's Exhibit 17 for identification.

31Q. What did you do as a result of this complaint?

A. Shortly after this complaint was received Mr. Joseph Hayes, of Hayes Brothers, returned from Miami, Florida, and he and I made an inspection of this installation.

32Q. What did you find when you inspected the installation? [519]

A. We found that the installation was not maintaining satisfactory temperatures on account of excessive frost and ice on the cooling unit.

33Q. What did you do to remedy the difficulty?

A. As I recall, Joseph Hayes questioned the Polar Ice Station operator and determined that he was defrosting the unit with an ordinary garden water hose. Mr. Joseph Hayes then suggested that I design perforated pipes over cooling coils that would accomplish this result without all of the slop and water running over the storage room.

34Q. Was this done? A. Yes, sir.

35Q. Who made the actual installation?

A. Mr. Herbert Hayes.

36Q. Under your supervision?

A. Under my supervision, yes, sir.

37Q. When was the change in the installation made?

A. It must have been made within a couple of weeks after Joe and I made that inspection.

(Deposition of Fred C. Barton)

38Q. Will you describe exactly what changes were made in the installation?

A. An installation consisting of perforated pipes was installed over each of the cooling coils in the McQuay unit cooler. These pipes were connected to a common header, and supplied with city water through a suitable city water line [520] provided with a stop and waste valve to turn sprays on when frost conditions required and drain piping out to prevent freezing. The drip pan on the McQuay unit was connected with suitable drain piping through a suitable trap to prevent re-entrance of outside warm air in the cold storage room, and same was piped to waste.

39Q. I show you a photograph and ask you whether you can identify the subject.

A. Yes, sir. That is a photograph inside the Tacoma and 10th Street Polar Ice Service Station looking toward the south end, showing the McQuay unit cooler and its piping and defrosting connection.

Mr. Neave: I ask that it be marked as Plaintiff's Exhibit No. 18 for identification.

40Q. I show you another photograph of the same McQuay unit cooler as shown in the previous exhibit, showing McQuay unit cooler suspension, refrigerant connection, supply defrost water line and headers into defrosters, McQuay drip pans and drain connection from same.

Mr. Neave: I ask that this be marked as Plaintiff's Exhibit No. 19 for identification.

41Q. Would you be good enough to mark on Plaintiff's Exhibit 19 an arrow pointing to the pipe to which I am

(Deposition of Fred C. Barton)

now pointing, and the end of the arrow marked "A," so as to identify that particular pipe? [521]

A. Yes, sir.

42Q. Now will you tell me what was the purpose of this pipe?

A. That is the city water supply line to the perforated header over cooling coils for defrosting purposes.

Mr. Lyon: I think at this time I would like to have the record show present at the taking of these depositions, equipped with the exhibits, is Mr. A. G. Loeffel, Chief Engineer of Marlo Coil Company of St. Louis, Missouri.

43Q. As I understand it, the top end of this pipe "A" goes to the shower pipes over the coils. Is that correct?

A. That is correct.

44Q. Where does the other end of the pipe go?

A. The other end of the pipe goes to the city water supply located in a pit outside of the cold storage room. Is that satisfactory?

45Q. It is, if it is correct.

A. It is correct. I wondered if you wanted any more details on that pipe.

46Q. That is sufficient. Will you please mark with a "B" the pipe to which I am now pointing?

A. Yes, sir.

47Q. Will you tell me what this pipe is?

A. Pipe "B" is the drain connection from the McQuay unit cooler drip pan to waste, the water sewer. [522]

48Q. I show you a third photograph and ask you whether you can identify it.

A. Yes, sir. That is the south or rear end of the Polar Ice Service Station at 10th and Tacoma, showing the lean-to building enclosing the Frick refrigeration unit.

(Deposition of Fred C. Barton)

49Q. Does it appear to be in the condition in which you saw it in 1934 when this unit was installed?

A. No, sir, it was a new structure then. It looks in pretty bad shape here.

Mr. Neave: I will ask that this be marked as Plaintiff's Exhibit 20 for identification.

50Q. I show you a fourth photograph and ask you whether you can identify it. A. Yes, sir, I can.

51Q. What is it?

A. It is the Frick refrigeration unit together with its piping installed in the Tacoma and 10th Street service station of Polar Ice & Fuel Company.

Mr. Neave: I will ask that it be marked as Plaintiff's Exhibit 21 for identification.

52Q. Am I correct in my understanding that this Frick unit comprises a compressor and a condenser?

A. That is correct.

53Q. And a motor? A. And a motor. [523]

54Q. Will you please mark with a "C" the compressor, with a "D" the condenser, and with a "E" the motor?

A. "C" compressor, "D" condenser?

55Q. Yes. A. "E" motor?

56Q. "E", the motor. A. Yes, sir.

57Q. Now you testified with respect to Plaintiff's Exhibit 19 that the pipe marked "A" was the water pipe going to the shower pipes over the coils. Would you please identify this pipe "A" on Plaintiff's Exhibit 21, if it is there? A. Yes, sir. It is this pipe.

58Q. Will you mark it, please?

A. What, "A"?

59Q. Mark it "A", yes. A. Yes, sir.

(Deposition of Fred C. Barton)

60Q. On Plaintiff's Exhibit No. 19 you marked the waste pipe "B". If you find the same waste pipe on Plaintiff's Exhibit 21 will you please so mark it?

A. Yes, sir.

61Q. With respect to this waste pipe "B" I notice that to the right of the place you have marked "B" on the photograph there is a curve in the pipe. What is that?

A. That is a trap consisting of pipe and fittings in which water is trapped to prevent the re-admission of hot air [524] from the outdoors into the cold storage room.

62Q. Where does the waste from pipe "B" go?

A. The waste water from pipe "B" drains out on compression room floor slab.

63Q. Will you please indicate by the letter "F" the place where water comes from the city main?

A. Yes, sir, it is down in that little pit, comes out of the floor.

64Q. Just above the letter "F" that you have placed on Plaintiff's Exhibit No. 21, there appears to be some sort of a valve. Will you tell me what this valve is?

A. Yes, sir. That is a conventional drain and waste valve.

65Q. What is the function of a drain and waste valve?

A. The function of a drain and waste valve is to shut off the flow of city water to the system and drain all water in that system out to prevent freezing.

66Q. When the water is shut off by the closing of the valve what happens?

A. The valve uncovers a port leading to the discharge side of the valve, permitting the water on the discharge

(Deposition of Fred C. Barton)

side of the valve to drain through this port and out a tubing.

67Q. There seems to be a protuberance from the edge of the valve. What is that sticking out?

A. That is a piece of tubing from which the water [525] drained back out of the system flows.

68Q. Will you please mark this valve with the numeral "1"? A. Yes, sir.

69Q. Will you please describe the course which the water takes when valve "1" is opened, making appropriate markings on the photograph so that we can follow your description?

A. Water flows from this valve through two circuits, one of which is the supply water line, identified as line "2", from where water flows through valve "3", into automatic regulating valve "4", from there to inlet of water cooled condenser "D", flowing inside of inner tubing and condenser "D" to a point "5", where water leaves compressor and flows down through pipeline "6" to the sewer.

70Q. You have stated that there were two water systems, and now you have described one. Will you trace the second, please?

A. The second circuit branches from tee at location "7", flows through valve "8", continuing through line "A" to perforated water headers over coils.

71Q. I think that you had better make another identification for valve "8" and put the number out here, because I cannot read it. A. Yes, sir.

(Deposition of Fred C. Barton)

72Q. Referring again to Plaintiff's Exhibit 21, what is [526] the nature of valves "8" and "3"?

A. The function of valve "8" is to shut off the flow of water to the defrosting header when refrigeration unit is in operation. The function of valve number "3" is to shut off the flow of water to the refrigerating condensing unit when valve "8" is open for defrosting.

73Q. What kind of valves are these, simply valves that open and close the line?

A. Those are conventional standard gate valves.

74Q. Will you state whether or not this picture, plaintiff's Exhibit 21, correctly shows the arrangement of piping, valves, and layout, together with the condenser and compressor as it was installed under your supervision in 1934?

A. To the best of my memory, that is the arrangement that was installed at that time.

75Q. Did you ever operate this system?

A. Yes, sir.

76Q. When was that?

A. After the defrosting installation was made I operated this system to test and be certain same functioned satisfactorily and to illustrate to the plant operator and Mr. Lamar how same functioned.

77Q. Did it function satisfactorily to defrost the unit?

A. Yes.

78Q. Will you state whether or not the accumulated frost [527] on the unit was removed by the water spray?

A. The frost and ice was successfully removed from the coils with this spray.

(Deposition of Fred C. Barton)

79Q. How long did it take to defrost the unit?

A. Approximately ten minutes.

80Q. What temperature were maintained by this unit in the ice storage room?

A. Approximately 30 degrees. The compressor was set to a cycle between 28 and 30 degrees.

81Q. How do you know that this temperature was maintained?

A. To satisfy the purchaser, I conducted a test, using six Bureau of Standards calibrated mercurial thermometers suspended in ice storage room, reading temperatures over a period of time

82Q. What did these tests show?

A. These tests proved that the temperatures maintained by this installation were 30 degrees or less.

83Q. Do you know whether the Polar Ice & Fuel Company paid for the installation?

A. Yes, sir, they did.

84Q. After making this installation did you ever see it again?

A. Yes, sir.

85Q. What was the occasion for your seeing it again? [528]

A. It was my habit to visit all of my installations periodically to determine if they were operating satisfactorily, and particularly in this case, where we had had trouble, I wanted the good will of Polar Ice & Fuel Company for future business.

86Q. In what year did you last see this installation?

A. 1936.

(Deposition of Fred C. Barton)

Cross Examination

By Mr. Lewis Lyon:

87Q. You have not, Mr. Barton, seen this installation recently. A. No, sir.

88Q. Why not? A. I had no reason to see it.

89Q. Is the installation still in existence?

A. I don't know.

90Q. You have not tried to find out?

A. No, sir.

91Q. When is the last time that you did try to find out, if at any time?

A. When I was still associated with Hayes Brothers. That would be in '36.

92Q. You do not know whether the installation is operating now or not? A. No, sir, I don't. [528]

93Q. You have made no effort to determine that fact?

A. No, sir.

94Q. The installation, according to your testimony, was made here in this city, was it?

A. Yes, sir.

95Q. What are you now doing, Mr. Barton?

A. I am general foreman and supervisory mechanical engineer, Allison Division, General Motors.

96Q. Where?

A. At their Plant 5, Maywood, Indiana.

97Q. You are acquainted with Mr. Loeffel here in the room, are you, Mr. Barton?

A. I have met Mr. Loeffel.

98Q. When did you first become acquainted with him?

A. I met Mr. Loeffel years ago when I was in the refrigeration business. I have recently met him again here in Indianapolis.

(Deposition of Fred C. Barton)

99Q. When?

A. Some time after the middle of last year.

100Q. Did you supply to Mr. Loeffel the photographs which you have here identified? A. No, sir.

101Q. Did he supply copies of those photographs to you? A. No, sir.

102Q. Where did you get them? [530]

A. I don't have them.

103Q. Where did you first see the photographs that have been presented to you here?

A. When they were shown to me by Mr. Goldsmith, local patent attorney.

104Q. When?

A. That was shortly after the middle of last year.

105Q. Shortly after you saw Mr. Loeffel?

A. Yes, sir.

106Q. Was Mr. Goldsmith working for the Marlo Coil Company? A. I don't know.

107Q. Was Mr. Goldsmith introduced to you by Mr. Loeffel?

A. No, sir. Mr. Goldsmith and I were directors on the old Indianapolis Engineering Society.

108Q. And you first saw these photographs when they were presented to you by Mr. Goldsmith, is that correct?

A. Yes, sir, that is correct.

109Q. Do you remember the time?

A. Not accurately. It was shortly after the middle of last year.

(Deposition of Fred C. Barton)

110Q. What was the occasion of the presentation of these photographs to you? What was said by Mr. Goldsmith?

A. Mr. Goldsmith explained that he had been retained as patent attorney in a case involving litigation pertaining [531] to a refrigeration defrosting system.

111Q. You did not ask Mr. Goldsmith who he was retained by? A. No, sir.

112Q. Did he say there was pending litigation?

A. Yes, sir.

113Q. When was that?

A. That was at this same meeting shortly after the middle of last year.

114Q. What do you mean by the "middle of last year"?

A. Well, my memory is not too accurate. It must have been in June or July of last year. I don't have a diary.

115Q. You don't remember which it was, whether it was June or July? A. No, sir, I don't.

116Q. Did you ever check these photographs against the actual installation? And I mean by "these photographs" these exhibits which you have here identified. A. No, sir.

117Q. Did you make any effort to check the photographs against the installation? A. No, sir.

118Q. Do these photographs show any change of any kind or character in the installation which you say that you inspected in 1934? [532]

A. I know of no major changes. This installation was so indelibly imprinted on my mind due to the trouble—

119Q. (Interposing) Just answer the question. I am asking about changes.

A. I know of no major changes since the original installation.

(Deposition of Fred C. Barton)

120Q. Do you know of any changes of any character?


A. I note one in which the capacitor type motor, which was installed after the original installation, has been removed, because there is now a split phase motor on the unit.

121Q. You do not know when that change was made?

A. No, sir.

122Q. Do you note any other change that was made in this installation?

A. I see no other changes from the original installation. That statement was that this entire installation was indelibly imprinted on my mind due to this being such a headache and a source of so much trouble.

123Q. To your mind do these photographs show what you call this cold storage room in operation? 

124Q. Here are all of them.

A. I see no evidence the refrigeration unit is actually in operation. I do see ice in storage. [533]

125Q. I refer you to Plaintiff's Exhibit No. 18 for identification, and I will ask you to look at the McQuay ceiling type coil unit and determine whether or not that coil unit is frosted up.

A. From the appearance of the photograph, the coil is frosted.

126Q. Now I will ask you to look at this photograph, Exhibit 18, referring to this bottle on the floor, which I will mark "X". Tell me if that is not a bottle of water.

A. That bottle appears to contain a liquid. It would be impossible to state what the liquid is.

(Deposition of Fred C. Barton)

127Q. Is it not also true, Mr. Barton, that this structure which is here in the corner, and which I will mark "Y" is a water cooler?

A. Yes, sir, "Y" is a water cooler.

128Q. The function of that is to cool water and not to make ice, is that right? A. Yes, sir.

129Q. And that is located in this so-called cold storage room, is it not? A. Yes, sir.

130Q. Now, Mr. Barton, referring to this photograph, Exhibit 21,—you are an engineer, are you not?

A. Yes, sir.

131Q. Will you make me a drawing of this valve which you [534] have marked in this photograph as valve "1"? I will supply you with a piece of yellow paper for that purpose.

A. I take it you want a section of this valve.

132Q. That is right.

A. (After making sketch) I think that is a crude sketch of that type of valve.

133Q. That is the best sketch you can make of that valve is it? A. From memory, yes, sir.

134Q. It shows the complete structure, does it?

A. Not the complete structure. There is no detail or packing gland or the method the drain port is uncovered, which is indicated as dotted when the disc shuts off against the in-coming water.

The Court: What is he talking about? I haven't got a copy of that here.

Mr. Lyon: It is my exhibit. We will produce such a sketch.

(Deposition of Fred C. Barton)

(The document referred to was handed to the court.)

The Court: All right.

Mr. O'Hearn: Would you like to have that answer read again?

The Court: Yes, read it.

A. Not the complete structure. There is no detail of packing gland or the method the drain port is uncovered, which [535] is indicated as dotted when the disc shuts off against the in-coming water.

135Q Is that as complete as you can make the sketch, Mr. Barton?

A. No, sir. An engineering drawing takes time and equipment.

136Q. Is there any part or function you have left out of this sketch?

A. I know of no major part left out of it. It certainly is not complete in details regarding threads and design of packing gland, and so forth.

137Q. Where is the valve seat?

A. The valve seats on a ring in the lower portion of the valve.

138Q. You have just, at my request, or in answer to the last question, marked that ring as "Valve Seat," have you? A. Yes, sir.

139Q. What structure is it that seats upon this valve seat? Will you mark that?

A. That is marked as "Valve Disc."

140Q. And that valve disc shows the approximate size of that valve disc with relation to the seat, does it?

A. Yes, sir.

(Deposition of Fred C. Barton)

141Q. And the approximate location of the valve disc with respect to the valve seat, is that correct? [536]

A. When same is closed, yer, sir.

142Q. When the valve is closed? A. Yes, sir.

143Q. That valve disc is shown in correct position with what you have marked on the sketch as "port", is that correct?

A. No, sir, "Port" is above the disc when disc is closed.

144Q. Let us get the port in in the right position then. That port then is just a hole in the wall of the valve, is that correct? A. In the design of some valves it is.

145Q. I am asking about this one.

A. I haven't seen the interior of this particular valve.

146Q. You never saw the interior of this particular valve? A. No, sir.

147Q. Is that correct? A. That is right.

148Q. Whose make was this valve?

A. I don't know. It was purchased locally from a plumbing supply concern.

149Q. Are there any records available of any character or in any place of the purchase of this valve?

A. Not this specific one valve, since it was practice to order those in quantities. [537]

150Q. Is there any purchase order or records of any kind showing the purchase of any of the pipes, valves, or structures which you state were used in changing over this unsatisfactory Polar Ice installation into the structure that you now assert it to have been?

A. Some types of parts are common stock parts, in the Hayes Brothers' stock room, they would not be purchased individually for this installation.

(Deposition of Fred C. Barton)

151Q. Was there ever any bills made or rendered to the Polar Ice Company for these parts which you state were taken from stock and installed in this particular job?

A. Not to my knowledge.

152Q. Was there any charge ever made to the Polar Ice Company for making this conversion of this unit from one type of structure to another? A. I think not.

153Q. You merely did that on your own volition, is that correct?

A. We did that at Lamar's threat to remove the equipment, so we could collect for same.

154Q. There are no bills or documents of any kind existant to show the changes which were made in the original installation after this letter of May 2, 1934, Plaintiff's Exhibit No. 17 for identification?

A. Not to my knowledge. [538]

155Q. You never received any communication from Polar Ice & Fuel Company with reference to this particular installation in writing after this letter of May 2, 1934, is that correct?

A. Is your question "letter", or any communication?

156Q. Any communication in writing.

A. We received payment for the installation.

157Q. Do the records of Hayes Brothers show when that payment was made, do you know?

A. I am reasonably certain they do, yes, sir.

158Q. Do you have any recollection on when payment was made?

A. As I recall, pynment was made within 30 days after the installation was corrected.

(Deposition of Fred C. Barton)

159Q. Can you recall the month and year when that payment was made?

A. After my memory refreshed by looking at photo-static copy of Hayes Brothers invoices, I would say it was in June or July, 1934.

160Q. You personally have no knowledge of that fact then, of the date of payment, except by having someone show you what they stated to be a payment for that job?

A. I have knowledge of the general transaction and installation in 1934; the specific days and dates would be rather difficult to recall now. [539]

161Q. Referring to this letter, Plaintiff's Exhibit No. 17 for identification, do you recall whether the letter you say you received was signed or not?

A. I don't remember whether that was signed or not.

162Q. Do you know whether that letter was on the letterhead of any concern or on any letterhead?

A. Not for certain, no.

163Q. Do you have any knowledge, Mr. Barton, as to whether what appears to be a copy here, Plaintiff's Exhibit 17, is itself a photostat of the letter you actually received?

A. It appears to be, because Mr. Lamar definitely stated that he would confirm the conversation relative to the removal of the equipment.

164Q. You do not recall whether that letter that you actually received was either signed or on the letterhead of the Polar Ice & Fuel Company?

A. I don't remember that very clearly now.

165Q. Had you ever received any earlier correspondence from the Polar Ice & Fuel Company?

A. Pertaining to other business?

(Deposition of Fred C. Barton)

166Q. Yes. A. Yes, sir.

167Q. Was it not always the practice of that company to write on their own letterhead paper?

A. Yes, sir, unless Mr. Lamar in some of his outlying [540] plants dictated his correspondence from them.

168Q. Do you ever recall receiving any letter from Mr. Lamar which was not signed? A. No, sir.

169Q. Do you have any knowledge, Mr. Barton, of when the photographs, Plaintiff's Exhibits 18, 19, 20 and 21 were taken?

A. Only on another person's statement.

170Q. You have no knowledge yourself?

A. No, sir.

171Q. You were not present when they were taken?

A. No, sir.

172Q. Have you any records, Mr. Barton—you state you made certain temperature tests of this cold storage room—have you any record of those tests?

A. I do not have now. All my calculations and engineering and test data was retained by Hayes Brothers when I left them.

173Q. You have not seen that engineering data since then? A. Not since '36.

174Q. Did you ever experience, Mr. Barton, any tendency of any of the water pipes "A" or "B" in this structure to freeze up?

A. Not within the cold storage room during summer operation. [541]

175Q. Did you ever inspect what you say were the spray header pipes which you installed over the coils in the McQuay ceiling type unit? A. Yes, sir.

(Deposition of Fred C. Barton)

176Q. Did you ever notice these spray pipes freezing up?

A. No, sir, because they were perforated with holes in the bottom of them.

177Q. There was no tendency that you observed of these pipes to freeze?

A. No, sir. The instructions in the operation of the unit was after the defrost cycle that the fan be operated for a period of time to dry out the coil and the headers before refrigeration was turned back on.

178Q. For how long was the instructions to blow out the spray pipes before the refrigerant was returned to the coils?

A. As I recall, the spray cycle operated approximately five minutes washing the frost from the coils. Then the spray water was turned off and the fan cooler operated about five minutes without refrigeration to dry the unit out.

179Q. Do you remember the appearance of the inside of this storage room when this installation was made, Mr. Barton?

A. As I recall, it was a lumber finished interior with a glandular insulation between that and the exterior walls.

180Q. Do you remember the interior appearance of the lumber when this installation was made? [542]

A. You mean as to its shape, or quality, or deterioration or what?

181Q. That is correct.

A. When the installation was made the interior lumber was in good condition. I inspected that to be certain the unit had capacity to handle the job.

(Deposition of Fred C. Barton)

182Q. I refer you to Plaintiff's Exhibit 18 for identification. I refer you to the obvious deterioration of the interior wood as I have noted on that photograph at the places which I am making "W" in that photograph, and ask you if it is not a fact that that is water rot of that wood?

A. My opinion would not be of any value as to what type of failure that is, but obviously the lumber in that room has deteriorated considerably over the original installation.

183Q. You could not state or have no idea from your experience as to whether that is water rot or some other rotting or deterioration of the wood, is that correct?

A. From the appearances of this photograph, no. It could be caused by undue stresses, it could even be caused by the settling of that particular section of the wall. You see that fracture extends vertically.

184Q. I will also refer you to a section in the ceiling, which I will mark "Z" and ask you if that does not show a similar deterioration at that point?

A. Yes, sir, it does. [543]

185Q. I will also refer you to Plaintiff's Exhibit No. 18 and ask you to observe the condition of the opposite wall, and ask you if there is no evidence that of similar deterioration of the interior lumber structure, which I will mark "AA", on one side of the door, and ask you if there is not similar evidence of deterioration on the opposite side of the door?

A. Yes, sir, there is.

186Q. Was there a vestibule to this cold storage room, Mr. Barton?

A. No.

(Deposition of Fred C. Barton)

187Q. Where was the ice delivered?

A. At that time the ice was delivered on a platform outside of the entrance door, and loaded through that door into the room.

188Q. There is no photograph here showing that structure, is there? A. No, sir.

189Q. Did you ever observe the operation of this ice house under conditions of loading with ice?

A. No, sir.

190Q. You have no idea then what the temperature rise was that took place during the period of time that the box was being loaded with ice? A. No, sir.

191Q. You stated, Mr. Barton, that you made sketches of [544] this installation. Have you those sketches? A. No, sir.

192Q. Do you know where they are?

A. I wouldn't have the slightest idea. They could be in the engineering files of Hayes.

193Q. When did you last see them?

A. Shortly after the work was completed.

194Q. You stated that there was difficulty encountered in the operation of this original unit because they used an ordinary garden hose in an effort to wash the frost from the coils and it left the slop in the ice room. Is that correct?

A. Yes, sir.

Mr. Lyon: That is all.

Mr. Neave: Do you intend to offer in evidence the drawing the witness made, Mr. Lyon?

Mr. Lyon: Your Honor, I will ask that it be received in evidence as a part of the evidence, and as an illustration of the witness' testimony, as Defendant's Exhibit next in

(Deposition of Fred C. Barton)

order. It is marked Defendant's Exhibit A in this deposition.

The Court: Is it there?

Mr. Lyon: It is with the deposition.

The Court: It is with the deposition?

Mr. O'Hearn: Yes, it should be, your Honor. Yes, here it is.

The Court: The whole deposition will go in evidence and [545] this will go in as a part of the deposition. It will not be marked as a separate exhibit.

Mr. Lewis Lyon: I didn't get your Honor's statement.

The Court: The whole deposition will go in evidence. This will go in as a part of the deposition, without making or giving it any separate identifiable number.

Mr. Neave: Of course, all of our deposition exhibits are numbered Plaintiff's Exhibits No. So-and-so.

The Court: Yes.

Mr. Neave: I would like to have copied into the record the entire redirect examination of this witness, and I shall read it.

Redirect Examination

By Mr. Neave:

195Q. Mr. Barton, referring to Defendant's Exhibit "A", would you be good enough to describe the operation of this valve when the valve is closed, referring to the legends you have marked on the drawing?

A. The function of the valve when the valve is closed is the valve disc is seated against the valve seat.

196Q. As shown in the drawing?

A. As shown in the drawing, stopping flow of water from the inlet side of valve.

(Deposition of Fred C. Barton)

197Q. Is that the righthand side on the drawing?

A. Yes, sir. And opening drain port located above [546] valve disc.

198Q. Is that round, where it is shown on the drawing?

A. The circle shown on the drawing.

199Q. How does the draining water get to that port opening?

A. It drains by gravity from the discharge side of the valve down through the valve body across the top of the valve disc and out of the port.

200Q. Is the discharge side of the valve the lefthand side of the valve in the drawing?

A. Yes, sir.

201Q. You referred to a Mr. Lamar who was the engineer of the Polar Ice Company. Do you know whether or not he is still alive?

A. I have the report he is dead.

202Q. You mentioned the fact that you recalled this installation vividly because it was a headache and source of trouble. What was the headache and source of trouble you were referring to?

A. Unable to maintain temperatures through excessive frost on the unit, and repeated 'phone calls by Mr. Lamar to straighten the job out or take it out.

203Q. Was the job straightened out?

A. Yes, sir.

204Q. Were there any headaches or troubles thereafter?

A. No, sir. [547]

(Deposition of Fred C. Barton)

205Q. How was it straightened out?

A. It was straightened out by installing this water defrosting system to take the frost and ice off the coil.

206Q. Did you have any complaints with respect to the operation of this unit during the period of inspection which you made after the installation was complete and paid for?

A. No, sir.

207Q. In the normal operation of this unit when it was operated as instructed by you, what would be the condition of the coil just previous to the defrosting operation?

A. The coil fins would be heavily coated with frost to an extent that they reduced the air flow through the unit cooler materially.

208Q. Have you any knowledge as to the temperatures now maintained by this unit in the refrigerating room of the service station at 10th and Tacoma?

A. No, sir. I don't even know if it is in operation.

209Q. What was your knowledge as to the refrigerating conditions maintained after you made the installation and during your period of inspection?

A. My recollection is that the condition maintained had to be below freezing because the reason this equipment was purchased was to prevent the blocks of ice that were vended through an automatic vending machine from melting and sticking together, and had they melted and stuck together the unit would [548] have been unsatisfactory again, and we would have received a complaint.

210Q. Did you receive any such complaint?

A. No, sir.

(Deposition of Fred C. Barton)

211Q. What are stop and drain valves, such as you drew on Defendant's Exhibit "A", ordinarily used for in plumbing practice?

A. They are conventionally used as the city water service valve in residences, generally installed in basements. Their function is when the water is shut off to the house they drain the pipe in to prevent freezing.

212Q. In view of the condition of the building as shown in Plaintiff's Exhibits 18 and 19, have you a sufficient basis to express any opinion as to whether the unit which you installed would be able to maintain freezing temperatures within the refrigerating room?

A. That opinion would not be conclusive because no knowledge of the moisture condition and the insulation immediately behind the interior woodwork is shown.

Mr. Neave: That is all.

The Court: Any further cross examination?

Mr. Lyon: I have no more cross.

The Court: That is all of his deposition.

Mr. Neave: That is all of his deposition.

The Court: I will give you a short recess. [549]

(A short recess was taken.)

Mr. Neave: The next deposition is that of Mr. Hayes, Herbert E. Hayes, and I offer the direct testimony of Mr. Hayes. Mr. Herbert E. Hayes is the one who made the actual installation that Mr. Barton described.

The Court: He so testified.

Mr. Neave: Yes, and he described the installation, referred to the photographs, described the piping and the

valves, and so forth. I will read only a short portion of the deposition on page 68, at the top of the page.

"102Q. After completing the installation did you make any tests of the temperatures inside the refrigerating space?

"A. After I put the defroster on?

"193Q. Yes.

"A. I did.

"104Q. What did you find?

"A. I found out I was able to hold a temperature in the neighborhood of 28 degrees in there.

"105Q. Do you recall who was operating the plant at the time that you put in this water defrosting installation?

"A. I can only guess at it. I think his name was Martin.

"106Q. Did you give any instructions to anybody [550] as to the manner of operating the unit when you had completed the installation?

"A. I did.

"107Q. Who did you give those instructions to?

"A. This Mr. Martin.

"108Q. After making this installation and giving these instructions did you ever return to the installation in order to inspect it?

"A. I did.

"109Q. What did you find?

"A. Well, I don't know that I found anything, other than rechecking the job.

"110Q. Were there any complaints as to its operation?

"A. No, not at that time."

Now, I don't think it will be necessary for me to read anything further from that deposition.

The Court: Do you offer it all in evidence?

Mr. Neave: Yes, sir, all of the direct.

The Court: Do you have cross examination, Mr. Lyon?

Mr. Lewis Lyon: I will offer the cross examination, your Honor. There are some points of the cross examination that I desire to direct the court's attention to at the present time, beginning upon page 81, question 173. I will have to go back before that.

The Court: Let me see it. [551]

Mr. Lewis Lyon: On page 81.

"172Q. Do you know that the temperature of the room is now?

"A. No.

"173Q. Or when you were there this morning?

"A. No, sir.

"174Q. Do you know whether it was above or below freezing?

"A. I would say it was above freezing.

"175Q. Did you inspect the ice that was in there?

"A. No, sir.

"176Q. Do you know whether it was dry or not?

"A. No, sir.

"177Q. As a matter of fact, you do know it is not necessary for it to be below freezing for the ice to be dry enough to pass through the dispensing machine?

"A. No, sir, I don't know that.

"178Q. You did not know that?

"A. No, sir.

"179Q. You believe it has to be below freezing

"A. To hold it?

"180Q. In order for the ice to pass satisfactorily through the ice dispensing machine.

"A. That I wouldn't know.

"181Q. You don't know? [552]

"A. No, sir."

Then on page 88—

The Court: On page 82 about the wood rot—oh, he said he doesn't know anything about it?

Mr. Lewis Lyon: He said he didn't know anything about the wood rot, I believe, this witness. On page 88: With respect to the pipe, as viewed in the photograph, beginning with question 213:

"213Q. Is it not true, or do you have any knowledge of the direction in which the pipes which you say you have marked "A-1", "A-2", and "A-3", in Plaintiff's Exhibit 19, extend into coil unit?

"A. It extends into the housing of the unit.

"214Q. Are they horizontal or inclined?

"A. I don't know.

"215Q. You have no idea?

"A. No, sir.

"216Q. You have no idea what they were when the installation was made?

"A. No, sir.

"217Q. You do not know whether they were placed in a definite horizontal position or were inclined, is that correct?

"A. They should have been inclined.

"218Q. How could they be inclined?

"A. I don't know.

"219Q. You never looked at them?

"A. No, sir."

That, as far as I recall at the present time, covers the points which I desire to point out in the cross examination of this witness, but I will ask that it all be copied, your Honor.

The Court: Very well.

Mr. Neave: I will offer the entire redirect examination. I don't think there is anything I need call your Honor's attention to just at the moment with respect to it.

Mr. Lewis Lyon: I don't believe the recross examination needs to be put in, your Honor. There is no reason for copying it in the record.

The Court: There are only two questions. You might just as well put them in and you will have them there to argue about, if you want to.

Mr. Lewis Lyon: All right.

HERBERT E. HAYES,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

Direct Examination

By Mr. Neave:

1Q. What is your full name, Mr. Hayes? [554]

A. Herbert E. Hayes.

2Q. Your residence address?

A. 818 East 55th Street.

3Q. Indianapolis? A. Indianapolis.

4Q. Where are you employed at the present?

A. Johnson Service Company.

5Q. Where is that?

A. 333 North Pennsylvania Street, Architects Building.

(Deposition of Herbert E. Hayes)

6Q. Indianapolis? A. That is right.

7Q. Were you ever employed by Hayes Brothers of this city? A. I was.

8Q. Do you recall when you were employed there?

A. Yes, from 1912 to 1940.

9Q. While you were there did you ever do any work on a job for Polar Ice & Fuel Company?

A. I did.

10Q. Where was that work that you did, you recall?

A. Tenth and Tacoma Streets, Indianapolis.

11Q. What work did you do there?

A. I installed a Frick ice machine and compressor, also a blower unit.

12Q. What was the place in which you made this installation? [555]

A. Well, it was an ice storage plant.

13Q. How was the ice sold from this plant?

A. Well, they had a trucking system there, and they had automatic machine system.

14Q. By "automatic machine system" what do you mean?

A. That is a coin system, put coins in a machine and certain sizes of ice come out, a 25 or 50-pound piece.

15Q. Would you please describe to me the installation which you made in this building?

A. Well, I installed this ice machine; I installed a Niagara blower, and put them in operation before I left.

16Q. Can you tell me the year in which you installed the Niagara blower?

A. I think it was in 1934.

(Deposition of Herbert E. Hayes)

17Q. Was the installation a successful one?

Mr. Lyon: I object as calling for a conclusion of the witness. A. No, it was not.

18Q. Why not?

A. Well, it couldn't hold temperatures, and the blower kept freezing up all the time.

19Q. What did you do about the fact that you could not hold the temperatures?

A. Well, there was only one thing to do, and that was to try to get the ice off of the blower. [556]

20Q. Before you tried to get the ice off of the blower did you make any change of any of the equipment in the installation?

A. To the best of my knowledge, sometime—I wasn't on the job, I was putting other jobs in in town—I believe the changed the motor from one size to another, and tried that.

21Q. Was there any other change made in the refrigerating unit itself?

A. Not until we changed the type blower. We put another type plower in.

22Q. What kind of blower did you put in?

A. I believe it was McCray.

23Q. Would you please give me a description in some detail of the piping which you installed when you made the original installation of the Frick compressor unit and the Niagara blower? A. That is the first trip?

24Q. The first trip.

A. I installed the compressor and condenser, hung the blower from the ceiling, and then I put a stop and waste on a water cap line they had in a little pit there.

(Deposition of Herbert E. Hayes)

25Q. Where was the pit?

A. The pit was just a little off center in this small room in the rear of the building, about 12x18 inches deep [557] and about 12 inches wide, and removed the cap and put this valve on.

26Q. That was the cap on—

A. (Interposing) The cap on the three-quarter water line that came in there for this ice machine,—although there was no water on this line at that time. I put a stop and waste on that line and came up possible six or eight inches and put an elbow on, and run over, and supplied an automatic water valve on the ice machine.

27Q. What connections were there between the ice machine itself and the blower unit?

A. In regards to water?

29Q. In regard to anything.

A. I had my suction line and my liquid line to my blower, which is an expansion valve on the back of the blower.

30Q. What do you mean by the "liquid line"?

A. The methly chloride.

31Q. That is the refrigerant?

A. Yes, sir.

32Q. Was there any water connection with the blower unit at this time? A. No, there was not.

33Q. How was the defrosting done at this time?

A. Well, they had two methods,—either turn the machine off and let it down for a length of time, which would [558] defrost itself,—and we found that was not practical, because it was too long; and the next method was just to take the hose and spray it off.

(Deposition of Herbert E. Hayes)

34Q. Do you recall as to whether or not there was any complaint made as to the operation of this unit after you had made the original installation?

A. Yes, there was.

35Q. What was done as a result of this complaint?

A. After they had changed the motor?

36Q. Whenever it was.

A. They had changed the motor at one time, and that didn't work, and I think the next thing they did, they bought a McCray blower, and I went out and took down the Niagara and hang this McCray.

37Q. When you say "they" bought the McQuay blower, who do you mean by "they"?

A. Hayes Brothers.

38Q. To the best of your recollection how long after the original installation was it that you went out and put in the McQuay blower?

A. I will have to take a guess on that.

39Q. What would be your best guess?

A. I would say 60 to 90 days; it might have been longer.

40Q. Can you tell me what year that was in? [559]

A. That was in 1934.

41Q. Tell me just what you did when you took out the Niagara unit and substituted the McQuay unit. What connections did you make?

A. Other than was originally in? Is that the idea?

42Q. That is right,

A. At first when I put the McCray blower in we tried it out and we found out later on it was frosting up. Then I went back and put this spray system in there.

(Deposition of Herbert E. Hayes)

43Q. Put the spray system in? A. Yes.

44Q. What year was it when you put the spray system in? A. 1934.

45Q. When you put the spray system in what type connections did you make?

A. Well, I removed that elbow that I had in the pit there going to my ice machine and replaced that with a tee. That gave me an opening out of the top. I raised up possibly three or four inches and put the elbow up there. I ran from that point there over to the wall and into the cooler, and from there up to a small header I had on the McCray unit with a three pipe sprayer.

46Q. What valves, if any, did you place in this line?

A. I placed a one-half inch valve in the half inch line going to the spray head, and a half inch valve in front [560] of my automatic water valve in front of the ice machine.

47Q. Where were these valves with reference to the refrigeration room? Were they inside the refrigeration room or outside?

A. They were outside, in the room that was designed for the equipment. There was also a ^{waste} ~~feste~~ line I put in there, as far as piping is concerned. I put in an inch and a half waste line from the pan to bring the water out into this little shed, with possibly a 10-inch seal in the line.

48Q. What was the purpose of the seal?

A. To keep the warm air from the outside getting in there.

49Q. Getting into where?

A. Into the cold storage room.

(Deposition of Herbert E. Hayes)

50Q. I show you Plaintiff's Exhibit 18 and ask you recognize what this is a picture of.

A. Yes. That is a picture of the blower I put in that particular room.

51Q. What room is this?

A. The ice storage plant at 10th and Tacoma of the Polar Ice & Fuel.

52Q. Which unit is this?

A. That is the McCray unit.

53Q. I show you Plaintiff's Exhibit 19 and ask if you can tell me what that is a picture of. [561]

A. That is a picture of the same blower.

54Q. At the Tacoma and 10th Street plant?

A. That is right.

55Q. What is the pipe marked "A"?

A. That is the water supply to the sprayer.

56Q. Would you be good enough to mark on Plaintiff's Exhibit 19 the pipes that go into the three headers, the three spray pipes that you stated were over the coils? Would you mark these "A-1", "A-2", and "A-3"?

A. You mean the three spray headers?

57Q. The three spray headers, yes.

A. (Witness does as requested.)

58Q. What is the pipe marked "B"?

A. "B" is the waste line from the pan.

59Q. Where does the waste line go?

A. That goes just outside of the wall with a seal from the pan to the floor.

60Q. I show you Plaintiff's Exhibit 20 and ask you if you can identify this picture. A. I do.

61Q. What is it a picture of?

(Deposition of Herbert E. Hayes)

A. That is the shed built in the back of the storage room.

62Q. Of the plant at 10th and Tacoma?

A. That is right. [562]

63Q. What was the purpose of this shed?

A. For the new equipment to be installed, which houses the ice machine and also the electrical switches.

64Q. I show you Plaintiff's Exhibit 21 and ask you whether you recognize it. A. I do.

65Q. What is it a picture of?

A. That is a picture of the ice machine, the condenser, the waste line, and the water supply lines.

66Q. Referring to Plaintiff's Exhibit 21, what is pipe marked "A"?

A. Pipe "A" is the water supply to the spray header.

67Q. And pipe "B"?

A. "B" is the waste line from the pan to the bottom of the blower.

68Q. Is the trap shown in that pipe "B"?

A. There is.

69Q. Where is it in the picture?

A. Right there.

70Q. Where is that, on the right-hand side of the picture? A. That is right.

71Q. What is the part marked "C"?

A. "C" is above a fitting.

72Q. The whole thing, the whole structure.

A. The whole thing is the compressor. [563]

73Q. What is "D"?

A. "D" is the condenser.

74Q. And "E"? A. "E" is the motor.

(Deposition of Herbert E. Hayes)

75Q. Referring to this photograph, Plaintiff's Exhibit 21, and the lettering and numbering, will you please describe just what it was that you installed when you made the first installation of the Frick unit and the Niagara blower?

A. That is the first trip?

76Q. The first trip.

A. All right, sir. I put in—I guess that is "F", I put in that stop and waste valve the first thing.

77Q. The stop and waste valve is "1"?

A. "1", yes. Then I raised up there with this short nipple, and this elbow was down where the tee was.

78Q. This elbow being—I think that is "2", Mr. Hayes. You are referring to the elbow that is just above the stop and waste valve "1"?

A. Which is above the tee. That is down where the tee is now. Then I came from the elbow across and connected the water valve.

79Q. By pipe "2"?

A. By pipe "2", that is right.

80Q. And what was the purpose of this water line?

A. That water line was to supply the automatic water [564] valve to the compressor and the condenser of the Frick machine.

81Q. To supply water to the valve?

A. That is right.

82Q. When you returned to make the installation of the defrosting device what changes did you make in the piping?

A. I removed the elbow that was directly above the stop and waste, I replaced that with a tee. That tee supplied my water to my automatic water valve. That is the

(Deposition of Herbert E. Hayes)

side opening of that tee. I came out of the top that valve and used the elbow I originally had in place of the tee, which gave me an opening for my spray header, and in that line I placed I believe it was a half inch gate valve. This was the valve.

83Q. Is that valve "8"?

A. That is right. From that point I run over into the cold storage room.

84Q. With line "A"? A. Line "A" is right.

85Q. What connections then did you make in the cold storage room,—referring to Plaintiff's Exhibit 19?

A. I carried this line "A" through and up to the spray headers, which is "A-1", "A-2", and "A-3."

86Q. Did you install the spray headers as well?

A. I did.

87Q. Now on what blower unit was this done, the Niagara unit or the McQuay unit? [565]

A. The McCray unit.

88Q. Will you state whether or not the blower shown in Plaintiff's Exhibit 19 and the arrangement of the piping marked "A", "A-1", "A-2", "A-3", and "B" were installed by you in 1934 as shown in Plaintiff's Exhibit 19?

Mr. Lyon: That is objected to as leading, grossly so.

A. Yes, it is.

89Q. They were so installed by you in 1934?

Mr. Lyon: The same objection.

A. Yes.

90Q. Referring to Plaintiff's Exhibit 21 will you state whether or not the arrangement of the compressor-condensed unit, piping and valves, as shown in Plaintiff's Exhibit 21, were installed by you in 1934?

(Deposition of Herbert E. Hayes)

Mr. Lyon: That is objected to as leading.

A. Yes.

91Q. After the completion of the installation of the spray unit that you have testified about, did you ever operate this defrosting unit?

A. I did.

92Q. Will you describe, by referring to Plaintiff's Exhibit 21, just what you did in order to operate this unit, referring to the numbered and lettered legends on Plaintiff's Exhibit 21? A. To defrost? [566]

93Q. To defrost.

A. Yes, I would stop the blower by throwing out the switch, stop the compressor by throwing out the switch, and shutting off—there is no number on that, I guess that is "3",—shutting off valve "3" and opening valve "8".

94Q. What did that do?

A. That puts a small spray of water over the three rows of coils in the blower.

95Q. What did that spray do?

A. That took the ice off the coils.

96Q. How long did it take to defrost the coils?

A. Oh. I would say two to three minutes. Of course it all depends on the ice that was on the coils, but in ordinary defrosting it took from two to three minutes.

97Q. What did you do after the frost had been taken off of the coils?

A. Why, I would wait a minute and let all the water get down into the pan, and then I would come out and I would shut off valve number "1".

98Q. That is the stop and waste valve?

A. The stop and waste line, which would drain all the water ahead of that valve.

(Deposition of Herbert E. Hayes)

99Q. What was the object in doing that?

A. To drain the water that might be left in the pipe lines from the McCray unit back to the water supply. [567]

100Q. After this water had been drained out what did you do? A. Then I would turn off valve "8".

101Q. What did this do?

A. That valve "8" was my water supply to my spray header. I would open valve "3" which is the water supply to my automatic water valve on the compressor. I would open valve "1", throw in my switches on my blower and compressor.

102Q. After completing the installation did you make any tests of the temperatures inside the refrigerating space? A. After I put the defroster on?

103Q. Yes. A. I did.

104Q. What did you find?

A. I found out I was able to hold a temperature in the neighborhood of 28 degrees in there.

105Q. Do you recall who was operating the plant at the time that you put in this water defrosting installation?

A. I can only guess at it. I think his name was Martin.

106Q. Did you give any instructions to anybody as to the manner of operating the unit when you had completed the installation? A. I did.

107Q. Who did you give those instructions to?

A. This Mr. Martin. [568]

108Q. After making this installation and giving these instructions did you ever return to the installation in order to inspect it? A. I did.

(Deposition of Herbert E. Hayes)

109Q. What did you find?

A. Well, I don't know that I found anything, other than rechecking the job.

110Q. Were there any complaints as to its operation?

A. No, not at that time.

111Q. Were there any complaints that the ice stored in the building was melting?

A. To the best of my knowledge, no, I had no complaints of that, because the 28 degrees kept it from melting.

112Q. Were there any complaints that water in the header or the line "A" bringing water up to the header had frozen within the refrigerated room?

A. Not to my knowledge.

113Q. Will you describe to me the construction of the stop and waste valve "1", which you installed?

A. Well, it is a standard stop and waste valve, wheel handle, which, when closed, drains all the water ahead of this valve.

114Q. I show you Defendant's Exhibit "A" and ask you whether it is a correct drawing of the internal mechanism of the stop and waste valve which you installed in the 10th and [569] Tacoma service station, and if it is not, how you would alter that drawing to make it a correct one?

A. Well, I believe that particular valve is a double-seated valve; it has a seat here and also at the top, so as to block this off when the vent is off.

115Q. Can you indicate with ink on the drawing where such a seat would be?

A. Yes, but it would only be guesswork. I don't know the construction of that valve. There are lots of different types of valves, lever handle and wheel handle.

(Deposition of Herbert E. Hayes)

116Q. You never looked inside the waste valve that was installed?

A. No, but a valve of this sort is generally double seated, so when open it is seated and when closed it is seated.

117Q. Can you tell me whether the valve I am now showing you is of the same type of valve which you installed in the 10th and Tacoma Street service station?

A. Yes, I would say it was, the type, but not the make.

118Q. Can you describe to me the general operation of that valve? First of all, when the handle of the valve is turned to the open position how does the water pass through the valve?

A. This happens to be a globe valve, and that passes straight through the valve in that position to the spray head, [570] to the compressor, or anything on the other side of that valve.

119Q. When the valve is closed what is the operation of the valve?

A. It drains everything ahead of the valve through this small port.

120Q. The small port being the spigot?

A. That is right.

Mr. Neave: I offer this valve in evidence as Plaintiff's Exhibit 22.

Mr. Lyon: The offer is objected to on the ground the valve is not shown to have any connection with the valve in question. In fact, it is stated to be a different valve, of different type and different construction, and therefore incompetent, irrelevant, and immaterial.

(Deposition of Herbert E. Hayes)

(Plaintiff's Exhibit 22, so offered in evidence, is attached to these depositions.)

121Q. In view of Mr. Lyon's statement, I will ask you again whether this valve, Plaintiff's Exhibit 22, is of the same type as that which you installed in the 10th and Tacoma plant?

A. The same type, but I don't believe it is the same make.

122Q. It is the same type?

A. The same type, yes, which we call wheel handle stop and waste.

123Q. Its method of operation is the same? [571]

Mr. Lyon: Objected to as leading.

A. Yes, the same.

Mr. Lyon: I move to strike out the answer on that ground.

124Q. Mr. Hayes, at my request did you visit this plant at 10th and Tacoma Streets this morning?

A. I did.

125Q. How often have you been back to the installation since you left Hayes Brothers employ?

A. This is the first time.

126Q. Did you find that the plant was in operation?

A. It was not in operation.

127Q. What did you find with respect to the arrangement of piping as shown in Plaintiff's Exhibit 21?

A. I found line "B" being disconnected. I found—well, I am not sure, but I believe this union was disconnected and that union was disconnected.

128Q. The union in line "2"? A. Yes.

129Q. And the union in line—

A. (Interposing) "8".

(Deposition of Herbert E. Hayes)

130Q. I think that is line "A". A. "A".

Mr. Lyon: Just mark those unions, will you, please?

The Witness: I am not sure about this.

Mr. Lyon: Just mark them. [572]

131Q. Mark the union in line "2" with a line to it as "2U"; and the union in line "A" as "AU".

A. (Witness does as requested.) I am sure I found this line here disconnected.

132Q. Mark that line you are pointing to.

A. That is a flared connection right there.

133Q. Mark that as "G".

A. (Witness does as requested.)

134Q. What is the connection "G" that you have marked? Is it a water line?

A. "G" is the water line from the condenser to the compressor head.

135Q. Did you go into the refrigerating room this morning on your visit? A. I did.

136Q. Turning to Plaintiff's Exhibit 19, did you find any change in the arrangement of the parts from that shown in Plaintiff's Exhibit 19 on your visit this morning?

A. I did not.

137Q. Did you observe whether or not the ice, if there was any ice in the refrigerator room, was melting?

A. No, it was not melting, although they had very little in there. It was on the automatic machine. There was none in storage there.

Mr. Neave: That is all. [573]

(Whereupon, at 12:30 o'clock p. m. the further taking of these depositions was recessed until 1:15 o'clock p. m.)

Indianapolis, Indiana, February 13, 1945, 1:15 o'clock
p. m.

The parties met pursuant to adjournment, and the taking of depositions was resumed.

HERBERT E. HAYES,

resumed the stand, and testified further as follows:

Cross Examination

By Mr. Lewis Lyon:

138Q. What did you say you were doing at the present time, Mr. Hayes?

A. I am with the Johnson Service Company.

139Q. Who is the Johnson Service Company?

A. They install heating and air conditioning controls.

140Q. Where are they located?

A. 333 North Pennsylvania Street.

141Q. In this city? A. That is right.

142Q. What experience have you had in the refrigeration business, or had had prior to your connection with the Hayes Company?

A. I learned the business through Hayes Brothers.

143Q. How long were you with the Hayes Brothers? [574] A. From 1912.

144Q. How much experience had you had prior to this Polar Ice & Fuel Company job with the handling of ice?

A. Oh, possibly two or three years.

145Q. Is it not a fact, Mr. Hayes, that if you kept a cake of ice in a room at 28 degrees Fahrenheit, using an air circulation system over a fin coil structure that you will reduce the size and weight of that cake of ice?

A. I don't know.

(Deposition of Herbert E. Hayes)

146Q. You have no knowledge of that?

A. No. I am no engineer, I am just a steamfitter by trade.

147Q. Do you know where the frost comes from on a unit such as this fin unit that you say you installed for the Polar Ice & Fuel Company in a closed room of the character which you state you made that installation in?

A. Yes, I believe it came from the moisture from the outside and the inside.

148Q. Where does the moisture come from on the inside? A. They were using a hose to defrost.

149Q. If you are not using a hose to defrost?

A. They don't have any unless you open the door all the time.

150Q. There was no frost collected then?

A. Yes, after they would open that door maybe a dozen [575] times in the morning.

151Q. That is your idea of the only source of the frost that collects upon the fins of such a blower coil unit?

A. Not necessarily. They would bring that ice there in large trucks, possibly three or four truck loads at a time, and throw it in that storage room, and that door would be open quite awhile.

152Q. You say you are now in the air conditioning business? A. That is right.

153Q. Do you know of any uses of air conditioning in conjunction with refrigeration when the refrigeration is used for the purpose of dehydrating?

A. No, I don't think I do.

154Q. You know of no uses of refrigeration for dehydrating? A. Put that another way, can you?

(Deposition of Herbert E. Hayes)

155Q. You know of no place of refrigeration being employed for the purpose of actually taking the water out of the substance subjected to refrigeration?

A. No, I don't.

156Q. You don't? A. No, sir.

157Q. Do you know what is kept in this storage house at 10th and Tacoma, besides ice?

A. At that time? [576]

158Q. What was kept there when you were down there the other day?

A. There was kindling in there and there was a little ice.

159Q. And that is all?

A. That is all I noticed.

160Q. When were you there?

A. Within the last two or three hours.

161Q. Today? A. Yes.

162Q. And you did not notice milk, Coca-Cola and other beverages in the place?

A. No, sir, I didn't.

163Q. You did not? A. No, sir.

164Q. You did not see any milk there at all?

A. No, I didn't.

165Q. You did not look, did you? A. No, sir.

166Q. I was just down there, too, and it is full of milk and Coca-Cola and beverages. A. Full?

167Q. I wouldn't say full. Let me say there was about four cases of soft drinks, three or four cases of milk. A. How near to the unit? [577]

168Q. In the same room with it.

A. I went directly over to the unit.

(Deposition of Herbert E. Hayes)

169Q. And never saw anything else?

A. No, sir, I didn't.

170Q. Right underneath the unit there are cases of soft drinks.

Mr. Neave: I object to counsel testifying in this case.

171Q. You did not see that?

A. No, sir. In fact, I wasn't looking for that.

172Q. Do you know what the temperature of the room is now? A. No.

173Q. Or when you were there this morning?

A. No, sir.

174Q. Do you know whether it was above or below freezing? A. I would say it was above freezing.

175Q. Did you inspect the ice that was in there?

A. No, sir.

176Q. Do you know whether it was dry or not?

A. No, sir.

177Q. As a matter of fact, you do know it is not necessary for it to be below freezing for the ice to be dry enough to pass through the dispensing machine?

A. No, sir, I don't know that.

178Q. You did not know that? [578]

A. No, sir.

179Q. You believe it has to be below freezing?

A. To hold it?

180Q. In order for the ice to pass satisfactorily through the ice dispensing machine.

A. That I wouldn't know.

181Q. You don't know? A. No, sir.

182Q. Are you familiar with wood which is rotted because of moisture? A. No, sir.

183Q. You are not? A. I am no engineer.

(Deposition of Herbert E. Hayes)

184Q. You have not had any experience then on the inside of refrigeration plants to determine where wet rot occurs?

A. No, sir. I was concerned only in the mechanical end.

185Q. Were you in any way interested in or a part of or a part owner of the Hayes Company that you say you worked for?

A. My father happened to be one of the brothers.

186Q. Is that company still in existence?

A. It is.

187Q. You stated you made some temperature determinations in this room after you put this spray outfit in. Did you make any written report of those temperatures?

A. No, sir. [579]

188Q. Was there ever a written report made you know of? A. Not that I know of.

189Q. How many times did you state that you inspected this installation after you say you converted it to a spray outfit? A. I don't know.

190Q. Was it once or more?

A. It was more than once.

191Q. Did you ever see it when the spray pipes were frozen? A. No, I didn't.

192Q. You don't know that the spray pipes ever froze?

A. I never received that complaint, and I had been there after that was up.

193Q. As far as you know, the spray pipes never froze up? A. That is right.

194Q. And had to be defrosted by shutting off the unit and allowing the coil to come up to room temperature?

A. No, sir, I don't know that.

(Deposition of Herbert E. Hayes)

195Q. If that occurred, you have no knowledge of it?

A. That is right.

196Q. That is the only way by which the lines could be opened in that particular installation if they froze up once, isn't it? I mean by that, by turning off the unit and allowing the whole coil system to come up to room temperature, and assuming the room temperature is higher than freezing, and in that way getting rid of the ice in the water spray lines? [580]

A. Well, they would have to leave the water valve on to get water up there.

197Q. But if the line was frozen the water would not go through, would it? A. That is right.

198Q. Mr. Hayes, in referring to Plaintiff's Exhibit 19 for identification, do you know when that picture was taken? A. No, sir.

199Q. Are you able to say that that picture accurately represents the structure as it is there shown as when you state you made the installation?

A. No, I can't answer that. I think that is a cooler right there. That was not there when I made the installation.

200Q. Is there anything else on that picture which is not an accurate illustration of the room or the ceiling type coil unit or the piping system as it was when you installed it?

A. As far as the mechanical advantages, the water supply and this waste is the way I left it.

201Q. When you inspected it three or four hours ago it was still in the same mechanical condition as when you made the installation, is that correct?

A. Other than being disconnected.

(Deposition of Herbert E. Hayes)

202Q. Other than being disconnected, but the pipes that were connected were in the same position as when you made the installation? [581]

A. Yes, I would say that they were. I didn't go there on an inspection, I was there only ten or fifteen minutes.

203Q. Is that stated for the purpose of qualifying your last answer?

A. Well, no, not necessarily. I will say that this line and this line, when I was there a little bit ago, were the same.

Mr. Neave: Are those lines "A" and "B"?

The Witness: "A" and "B", yes, sir.

204Q. Is it not a fact, Mr. Hayes, that those lines are both inclined in such a way that the point, for example, of the line "B" where it enters or goes through the wall of the storage room is at a higher elevation at a point which I will mark "L" than it is in elevation at the point that I will mark "M" on Plaintiff's Exhibit 19 for identification.

A. Do you mean from this point to this point inside the wall?

205Q. That is right. That the pipe "B", as the other pipes of that system, incline downwardly from the point "L" to the point "M", as it is illustrated in Plaintiff's Exhibit 19?

A. Well, I noticed this morning that the seal is turned upside down.

206Q. Just answer that question, please. I am not asking how about something else.

A. From this point to this wall here you want to know [582] if this is higher than here?

(Deposition of Herbert E. Hayes)

207Q. If "L" is not higher than "M".

A. I can't answer that.

208Q. You have no idea? A. No, sir.

209Q. Then you have no idea what the condition was when you made the installation. That is also true, is it not?

A. I know that water would drain by gravity.

210Q. Just answer the question.

A. No, I don't know that.

Mr. Neave: Now, you can go on and continue the answer that you started.

The Witness: I know that that water drains by gravity from the pan to the floor.

211Q. Did you ever take the pipe "B" off between the points "L" and "M" to determine whether the water was out of it or not? A. No, sir.

212Q. In any of these inspections that you made?

A. No, sir.

213Q. Is it not true, or do you have any knowledge of the direction in which the pipes which you say you have marked "A-1", "A-2", and "A-3", in Plaintiff's Exhibit 19, extend into the coil unit?

A. It extends into the housing of the unit. [583]

214Q. Are they horizontal or inclined?

A. I don't know.

215Q. You have no idea? A. No, sir.

216Q. You have no idea what they were when the installation was made? A. No, sir.

217Q. You do not know whether they were placed in a definite horizontal position or were inclined, is that correct? A. They should have been inclined.

(Deposition of Herbert E. Hayes)

218Q. How could they be inclined?

A. I don't know.

219Q. You never looked at them? A. No, sir.

220Q. Is it not also true that the part which I will mark "O" is higher than the point that I will mark "P" in the water inlet pipe in Plaintiff's Exhibit 19?

A. What was the question again, please?

221Q. I say is it not a fact that on the water inlet line that the point "O" as I have marked it on Plaintiff's Exhibit 19 for identification is higher than the point on the same line that I have marked "P"?

A. I don't know; I never had occasion to measure that.

222Q. You do not know? A. No, sir. [584]

223Q. And you do not know what its condition was when you installed it? You never measured it at any time, did you? A. No, I believe not.

224Q. Is it not also true, or do you know, whether or not the point which I will mark "R" on Plaintiff's Exhibit 19 is higher than the point that I will mark "S" on Exhibit 19? A. No, sir, I don't know.

225Q. You never measured it? A. No, sir.

226Q. You do not know what it was when it was installed? A. No, sir.

227Q. Is it not a fact, Mr. Hayes, that you installed this so-called stop and drain valve on this unit in this construction for the purpose of draining the water from the condenser of the Frick refrigeration unit in this installation? A. For the original setup, yes, sir.

228Q. And that was the purpose of its installation, was it not? A. At that time, yes.

229Q. And it is the purpose that it performed after that time, is it not? A. That is right.

(Deposition of Herbert E. Hayes)

230Q. When you were out there this morning and inspected this unit did you have a sample of these photographs, Plaintiff's Exhibit 18, 19, 20, and 21, with you? [585]

A. No, and I don't care for the word "inspection," because I didn't inspect the job; I looked at the job.

231Q. When you were out there and looked at it did you have copies of these photographs with you?

A. I did not.

232Q. Was anyone with you who did have copies of them? A. This morning?

233Q. Yes. A. Absolutely not.

234Q. Who was with you this morning?

A. No one.

235Q. Is this the only time you have seen this installation since 1940?

A. Since 1934, to the best of my knowledge.

236Q. Since 1934? A. That is right.

237Q. You have not seen the unit from 1934 until today? A. Until this morning, that is right.

238Q. When did you first see the plaintiff's exhibits, the photographs, 18, 19, 20, and 21?

A. I would say within the last 90 days.

239Q. Who showed them to you?

A. Mr. Goldsmith.

240Q. He is a patent attorney here in town?

A. I don't know who he is. [586]

241Q. You don't know who he is? A. No.

242Q. Who introduced you to him?

A. He introduced himself.

243Q. No one with him? A. No.

(Deposition of Herbert E. Hayes)

244Q. When you looked, as you say, in this storage room today, you say there was ice there. Was the ice melting? A. I didn't examine it.

245Q. You did not see whether the ice had water on it or not? A. That is right.

246Q. You state that you installed this ceiling type McQuay coil unit for the Tacoma Ice & Fuel Company, is that correct?

A. No, I installed it for Hayes Brothers.

247Q. How long was it between the time you made that installation and the time you came back and state that you installed this water spray type system?

A. I don't know.

248Q. You have no idea? A. No, sir.

249Q. Was the unit in operation between those periods of time? A. The McCray? [587]

250Q. Yes.

A. Yes, it was in operation between the time, until I went back to put the spray in.

251Q. You have no idea how long it was in operation before the spray unit was installed?

A. No, I don't.

252Q. You can give no estimate of time?

A. Well, I would say within 90 days. I may be off one way or another, but we went back on the strength of the complaints.

253Q. And for that period of approximately 90 days it was operating, is that correct?

A. It might have been only 30 days. Let us make it 30 days. I don't know.

254Q. You have no idea?

A. No, sir, I don't have.

(Deposition of Herbert E. Hayes)

255Q. Do you have any knowledge of what happened to the Niagara blower unit that was taken out and the McQuay unit replacing it? A. No, sir, I do not.

256Q. Was the Niagara unit a smaller or a larger unit? A. I can't answer that.

257Q. You have no idea what the relative capacities of the two units were? A. No, sir. [588]

258Q. Was the Niagara unit also a blower type fin coil unit? A. It was.

259Q. Purchased from the Niagara Blower Company, do you know? A. I don't know.

260Q. Was this unit a McCray or a McQuay unit? A. I don't know. The name is on it is the only thing I can go by.

261Q. You don't know whether it was M-c-C-r-a-y or M-c-Q-u-a-y, which unit it was? A. I do not.

262Q. The only way you know it is either way is by the name that appears in the photograph, isn't that correct? A. That is right.

263Q. Is it not a fact, Mr. Hayes, that the reason for the use of this stop and drain valve which you have referred to is that without such a stop and drain valve being in position in this installation that these water pipes, being subject to the outside temperature outside of the storage room would freeze up in wintertime if it were not for the use of such a drain valve?

A. Unless you dismantle all the pipe work.

Mr. Lyon: That is all. [589]

(Deposition of Herbert E. Hayes)

Redirect Examination

By Mr. Neave:

264Q. Who was Mr. Joseph Hayes?

A. My uncle.

265Q. What is his position with Hayes Brothers?

A. President.

266Q. When you made the installation of the water sprays and put in the piping "A" shown in Exhibit 21, why did you not put in a second stop and waste valve in Line "A"?

A. Well, it would just have been poor practice.

267Q. Was there any necessity of putting in a second stop and waste valve? A. Absolutely not.

268Q. Why not?

A. Well, you have already had one in the line.

269Q. What function did the one already in the line perform with respect to line "A"?

A. Why, it would drain line "A" if you wanted to drain the water beyond the valve.

270Q. You stated in your cross examination that you did not know how long it was between the installation of the McQuay unit and the installation of the water spray? A. That is right.

271Q. Would the installation of the water spray have been made in the same year that the installation of the McQuay [590] unit was made?

Mr. Lyon: Objected to as leading, grossly so. The witness stated on cross examination he could not even estimate the time.

A. Yes, sir, it was.

(Deposition of Herbert E. Hayes)

272Q. Have you any knowledge as to whether the water spray was installed and tested before the Polar Ice & Fuel Company paid for the job?

Mr. Lyon: That is objected to as not redirect examination, and objected to on the ground the witness has not been qualified to answer the question.

273Q. The question is whether you have any knowledge of that. A. No, I have no knowledge of that.

274Q. What was your normal practice in the installation of piping when you put in a stop and waste valve in a line with respect to the layout of the pipes and the line?

Mr. Lyon: Objected to as assuming a fact of which there is no evidence.

A. It was just plumbing practice was all.

275Q. Plumbing practice for what?

A. For draining all the water beyond the valve in case of the closing up of a shut down.

276Q. That is, the stop and waste valve was so put in the line that it would drain all the water ahead of it in the line? [591]

Mr. Lyon: Objected to as leading, grossly.

A. That is right.

277Q. Will you state whether or not that was the manner in which you made the installation of the line "A" in the Tacoma and 10th Street Polar Ice plant?

Mr. Lyon: That is objected to as assuming a fact which the witness is not qualified to answer. He has stated he don't know the inclination of the pipes and never did.

A. I still don't understand the question.

(Deposition of Herbert E. Hayes)

278Q. I will rephrase the question. You stated that it was the plumbing practice which you followed when you had a line in which there was a stop and waste valve to so arrange the stop and waste valve and the line that it would drain the water back of the stop and waste valve.

A. Ahead of the valve.

279Q. What I am asking you now is whether you applied that standard plumbing practice to your installation in the Tacoma and 10th Street plant?

Mr. Lyon: I object to that question on the ground the witness is shown not to be qualified to answer the question. He has no idea of what the inclination of any of the pipes was either now or when he made the installation. Having so answered, he is obviously incompetent to answer this question.

A. I would say yes. [592]

Recross Examination

By Mr. Lewis Lyon:

280Q. Mr. Hayes, do you know or did you observe at the time you installed this ceiling type unit, which you say was the McCray or the McQuay unit, for Hayes Brothers at this 10th and Tacoma Street address, if there was a name plate and serial number plate on that unit?

A. No, sir, I don't know.

281Q. You have no knowledge of the removal of such a plate? A. That is right.

Mr. Lyon: That is all.

Mr. Neave: The next witness is Henry L. Dithmer, Jr., and I would like to have the direct examination copied into the record. Mr. Dithmer was the secretary and

treasurer of the Polar Ice & Fuel Company since 1925, the concern that bought this installation, and he was the one that produced Exhibit 13, which was the letter of proposal by Barton; 14, the Polar purchase order; 15, the Hayes invoice; 16, which was the second Hayes invoice; 17, the carbon copy of the May 2nd letter; and 23, the carbon of the check, which was in payment for the installation.

Mr. Lewis Lyon: I would like to offer the cross examination, too, your Honor, and ask that it be copied into the record. [593]

The Court: Very well.

HENRY L. DITHMER, JR.,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes and says:

Direct Examination

By Mr. Neave:

1Q. What is your full name?

A. Henry L. Dithmer, Jr.

2Q. What is your residence?

A. 5254 North Delaware Street, Indianapolis.

3Q. What is your occupation?

A. Secretary-Treasurer, Polar Ice & Fuel Company.

4Q. How long have you held that position?

A. Twenty-one years.

5Q. Are you in charge of the records of the company as Secretary? A. I am.

6Q. I show you Plaintiff's Exhibit 13 and ask you whether you have in the records of your company the original of this letter, and if you have, will you please produce it?

(Deposition of Henry L. Dithmer, Jr.)

A. I have or had. Do you mean right now, produce it right now?

7Q. If you have it with you.

A. Yes. The stitches are all rusted in. There are some [594] others there that are not exhibits.

8Q. Will you tell me whether Plaintiff's Exhibit 13 is a photostatic copy of the original which you have produced of letter dated January 18, 1934 from Hayes Brothers to Polar Ice?

Mr. Lyon: Having made an inspection, I will stipulate that it is.

Mr. Neave: I noticed in Plaintiff's Exhibit 13, the photostat, the corner it has not been fully photostated. Do you want another photostat made?

Mr. Lyon: No.

9Q. I show you Plaintiff's Exhibit 14—

Mr. Lyon: (Interposing) Let me inspect those, and maybe I can make the same stipulation as I did on the other.

I will stipulate that Plaintiff's Exhibits 14, 15, and 16, are true photostatic copies of the originals.

10Q. Mr. Dithmer, these Exhibits 14, 15, 16, and 13, are all documents kept in your files in the ordinary course of business? A. Yes, sir.

11Q. I show you Plaintiff's Exhibit 17 and ask whether you have the original of that exhibit from your files?

A. We have the carbon copy, the original carbon copy made of that letter, not the original letter. That was mailed to Hayes Brothers. [595]

12Q. This that you are producing is the original carbon copy? A. Yes.

(Deposition of Henry L. Dithmer, Jr.)

Mr. Lyon: This obviously is a photostat of what the witness says is a copy.

Mr. Neave: I offer in evidence Plaintiff's Exhibits 13, 14, 15, 16, and 17.

(Plaintiff's Exhibits 13, 14, 15, 16, and 17, so offered in evidence, are attached to these depositions.)

13Q. Now, Mr. Dithmer, can you tell me whether or not Polar Ice ever paid the bills shown on the Hayes' invoices, Plaintiff's Exhibits 15 and 16?

A. I can. They did.

14Q. Can you tell me the date of the check by which payment was made?

A. It was paid by our check 993, on a check dated July 11, 1934.

15Q. Have you a copy of that check?

A. We have a carbon copy we used for a check record.

16Q. You were unable to find the copy of the check itself?

A. That is right.

17Q. Will you produce the carbon copy, please?

Mr. Lyon: I will stipulate that is a photostat of this piece of paper that the witness produced.

18Q. What is the amount of the check that was made out [596] dated July 11, 1934 as seen from the carbon copy of the check which you have produced?

Mr. Lyon: The record speaks for itself and is the best evidence.

Mr. Neave: On account of the photostat not being very good, I wanted the witness's answer.

A. \$474.65.

Mr. Neave: I offer in evidence the photostatic copy of the carbon copy of the check No. 993 produced by the witness, as Plaintiff's Exhibit 23.

(Deposition of Henry L. Dithmer, Jr.)

(Plaintiff's Exhibit 23, so offered in evidence is attached to these depositions.)

19Q. Mr. Dithmer, does your company own a building on the corner of Tacoma and 10th Street?

A. They do.

20Q. Do you lease that building?

A. Do we lease it to an operator?

21Q. Yes. A. Yes.

22Q. Can you tell me to whom you have leased that building since 1934? A. Yes.

23Q. Will you please do so?

A. When we first opened that ice station it was leased to Charles Martin. That was in January of 1934. And he [597] operated it continuously until some time in October, I think about the 23rd of October.

Mr. Lyon: You mean he leased it until that time?

The Witness: He leased it and operated the station, yes.

24Q. Of the same year?

A. Of the same year. After that one of our employees by the name of Harold Schulmeyer operated it for a few days, I think four or five days. Then a man named Hiatt, now deceased, operated it from about October 27, 1934 until September 11, 1935. Then various company employees, whose names I do not know, operated it from September 11, 1935 to March 3, 1936. Then Roscoe and Earl Simons—Earl is Roscoe's son—operated it from March 3, 1936 until Mr. Simons, the older Simons, was killed in a hold-up, and Earl Simons has operated it continuously since then.

Mr. Neave: You may cross-examine.

(Deposition of Henry L. Dithmer, Jr.)

Cross Examination

By Mr. Lewis Lyon:

25Q. In your statement, by "operating" you mean—

A. (Interposing) That they leased it.

26Q. Leased it and sold ice out of it?

A. That is correct.

27Q. That is the limitation of what you mean?

A. Yes. [598]

Mr. Neave: The next witness is Oscar W. Nester, and I will offer his direct testimony. Mr. Nester was the purchasing agent of the Polar Ice Company since 1927, and he was the purchasing agent at the time this purchase was made. He identified Exhibit 14, which is the purchase order, and Exhibits 15 and 16 and some of his writing on them, and he testified that the job was paid for because the engineer of the company said it was satisfactory.

The Court: Do you want the cross examination in?

Mr. Lewis Lyon: Yes, your Honor.

OSCAR W. NESTER,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

Direct Examination

By Mr. Neave:

1Q. What is your full name, Mr. Nester?

A. Oscar W. Nester.

2Q. What is your residence address?

A. 5130 North Pennsylvania Street, Indianapolis.

3Q. By whom are you employed?

A. Polar Ice & Fuel Company.

(Deposition of Oscar W. Nester)

4Q. How long have you been with the Polar Ice & Fuel Company? A. July 25, 1923.

5Q. What is your position with them? [599]

A. Purchasing agent.

6Q. How long have you been purchasing agent?

A. Through the entire period.

7Q. Do you recall ever having made a purchase for your company from the Hayes Brothers, Incorporated, of Indianapolis, of a refrigeration installation, Mr. Nester?

A. Yes.

8Q. I show you Plaintiff's Exhibit 14, and ask you whether you can identify it?

A. Yes, that is my signature, and the order I wrote covering the installation.

9Q. I show you Plaintiff's Exhibits 15 and 16, and ask you whether you know anything concerning the words, "Hold" that appear on those two invoices?

A. Yes, that is my handwriting.

10Q. Why were they put on those invoices?

A. The installation was not satisfactory to pass payment of the invoice, so in order that it would not be paid I marked the word "Hold" there.

11Q. Were the invoices eventually paid?

A. They were paid.

12Q. Was the job satisfactory when they were paid?

Mr. Lyon: That is objected to as calling for a conclusion of the witness, and on the further ground he is not qualified to answer the question. [600]

A. I can answer it that it was satisfactory, because I asked the chief engineer if it was satisfactory and if the invoices could be passed for payment, and he said "Yes."

(Deposition of Oscar W. Nester)

Mr. Lyon: I move to strike the statement of the witness as hearsay.

13Q. Did you ever see the installation after it was made in the 10th and Tacoma Street plant?

A. Yes.

14Q. Did you ever see it operate?

A. Yes, I saw it operate.

15Q. Was that while Charles Martin was still the lessee? A. Yes.

16Q. Did he have any complaints as to its operation?

A. Yes.

17Q. What were his complaints?

A. That the machine would not defrost quickly enough. Naturally it is a cold room anyway, there is ice in there and the fins and coils would not defrost quickly enough, it took too long for them to defrost.

18Q. Was any change made in the installation after the complaint? A. After the complaint?

19Q. Yes. A. Yes, there was change made.

20Q. What change was made? [601]

A. I am not an engineer, understand. I can just tell you what is there.

21Q. I just want to know what you know.

A. At the time this was handled by Mr. Lamar, chief engineer, and I was not familiar with what changes were to be made, or were made, until after it was made, and when I saw piping installed above the unit like a sprinkler system to allow drippage of water to defrost the coils.

22Q. After that installation was made did you get any further complaints from Martin about its operation?

A. No, I think we were all satisfied the unit was giving the temperatures it was supposed to and was doing as good a job as could be expected.

(Deposition of Oscar W. Nester)

23Q. Was the bill thereafter paid?

A. The bill was then paid.

24Q. Is Mr. Lamar still alive?

A. No, he died in October.

25Q. Of 1944? A. 1944.

Mr. Neave: You may cross-examine, Mr. Lyon.

Cross Examination

By Mr. Lewis Lyon:

26Q. You know nothing of the series of changes which were made in this structure, do you?

A. I am not mechanically competent to tell you anything [602] except what I saw, and it was not my job to determine that. I bought it, and I asked the engineer if it was satisfactory, so I could get rid of the bill. That was it.

27Q. All you know then is that someone told you it was O.K. Is that correct?

A. Mr. Lamar told me, the chief engineer.

28Q. And you paid the bill? A. Yes.

29Q. That is really the sum and substance of what you know, is it not?

A. I bought it, and I got complaints on it, and I held up the bill, and I always ask the individual responsible for a purchase of this amount if it is satisfactory to be paid. He told me to hold it up, it wasn't doing right. Then after the change was made I asked him—I kept asking him, and he told me that it was satisfactory to pay it.

30Q. He told you it was satisfactory to pay the bill?

A. To pay the bill, yes.

Mr. Neave: The next witness is Elmer LeGrand Goldsmith, and I offer his direct testimony. Now, Mr. Goldsmith is a patent lawyer in Indianapolis, and his client was Mr. Hayes, Sr., of the Hayes Company. I would like to read, starting on page 115, if my assistant will co-operate.

"6Q. Have you a partner in any other city? [603]

"A. Yes.

"7Q. Who is that? "A. Dwight B. Galt.

"8Q. In what city?

"A. Washington, D. C. That is where his office is. He lives in Hyattsville, Maryland.

"9Q. Have you an office of the partnership in Washington? "A. We do.

"10Q. Are you acquainted with Joseph Hayes or Hayes Brothers? "A. Very well.

"11Q. How long have you known Mr. Hayes?

"A. I would say since about 1923 or 1924 when I became a member of the Sciencetech Club. He was then an active member of it, and still is, I believe, and so am I.

"12Q. Did Mr. Hayes ever consult you professionally in regard to a refrigerating or water defrosting unit?

"A. He did.

"13Q. When was that?

"A. I would say it was after lunch in the afternoon. I cannot give the day without referring to my diary. I have a memorandum of that date in September, 1934.

"14Q. Will you produce your diary and refer to it and refresh your recollection. [604]

"A. It was Wednesday, September 5, 1934.

"15Q. What are you referring to?

"A. I am referring to my 1934 daily diary.

"16Q. Is this a photostatic copy of your September 5, 1934 daily diary you have just referred to?

"A. That is correct.

"17Q. What did the entry in your diary mean?

"A. It means that Joe Hayes disclosed to me an invention and that he asked that a preliminary search be made, which search is made by Mr. Galt in Washington, that being a part of our partnership agreement.

"18Q. Did you write to Mr. Galt in regard to a search that was to be made for Mr. Hayes?

"A. I did.

"19Q. I show you a photostat of a letter dated September 5, 1934, to Dwight D. Galt, and ask you what that letter is, whether you recognize it?

"A. This is a 5-page letter, written by my then secretary Ann M. Kramer, and my numeral is shown as No. 4. It is signed, "ELG", those being my initials.

"20Q. Did you sign those initials?

"A. I did, sir. On page 3, the third line, the third last word, it is my correction. I cannot tell whether it was made in ink or pencil from this photostat. In the fifth line, the word "coil" was stricken [605] out by me. The two words, 'when cooling' was added by me either in pen or pencil. In the second line of the next paragraph the tense of the verb was changed from 'then are' to 'may be'. In the second last line I inserted, 'and eliminate frosting'. Again, on page 4, I cannot tell whether I am the one that underscored 'deluge type defroster',—I might add 'deluge' was Joe Hayes term for the arrangement—but the addition to the sentence, 'prevention of ice blocks freezing together' is in my handwriting. The insertion, 'that', in the following paragraph also is in my handwriting.

"21Q. The letter seems to refer to certatin drawings. Have you the drawings? "A. I do not.

"22Q. Have you your office copy of this original letter? "A. I do not.

"23Q. Is the original letter in your possession?

"A. It is not.

"24Q. How does it happen that you do not have the copy of this letter or the drawings?

"A. I might explain it this way; we are very cramped for storage space, and periodically we go through our files and strip them, and I believe that about three or four years ago we took out everything [606] from the files of the miscellaneous A to Z, such as relate to casual clients, and discarded them so we would have more space in our files. That leaves only in our files at the present time from 1935 on."

Now, I would like to refer your Honor to this Exhibit 25, which I would like to read.

The Court: I have read it.

Mr. Neave: You have read it already?

The Court: Yes, I have read it.

Mr. Neave: Very well, sir.

The Court: Although there is no drawing here.

Mr. Neave: That is right.

The Court: But I have read the letter.

Mr. Neave: Very well, sir.

The Court: It will be in the record?

Mr. Neave: Oh, certainly. That will be offered as an exhibit.

Mr. Goldsmith then identified certain other exhibits, such as the bill he rendered to Mr. Hayes, which is Exhibit 28, and the letter that he received back from Mr. Galt, Exhibit 26, and the letter that he wrote to Mr.

Hayes, Exhibit 27. I think that completes the direct examination.

Mr. Lewis Lyon: I will offer also the cross examination, your Honor, and particularly call your Honor's attention to the fact that Mr. Hayes has never made any reply of any [607] kind to Mr. Goldsmith's letter. He answered Question 41 on page 127, and nothing was ever done with this investigation. It was dropped there.

Mr. Neave: I will offer also the redirect examination and also, of course, the statements that may have been made during the cross examination. There was a statement that was made in regard to the exhibits by me, which should go in. There is a stipulation on pages 130 and 131, which should go into the record, and which pertains to Exhibits 25 and 26, to the effect that Mr. Galt, if called, would produce those records.

ELMER LeGRAND GOLDSMITH,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes and says:

Direct Examination

By Mr. Neave:

1Q. What is your full name, Mr. Goldsmith?

A. Elmer LeGrand Goldsmith.

2Q. What is your residence address?

A. 129 East 51st Street, Indianapolis, Indiana.

3Q. What is your occupation?

A. Patent lawyer.

4Q. How long have you been an attorney in Indianapolis?

A. I was admitted to the bar here, but prior to that [608] time I was practicing patent law in the office of the then firm, Lockwood & Lockwood.

(Deposition of Elmer LeGrand Goldsmith)

5Q. Of this city?

A. Of this city. That was in September, 1919. I don't remember whether I was admitted to the Bar in 1921 or 1922.

6Q. Have you a partner in any other city?

A. Yes.

7Q. Who is that? A. Dwight B. Galt.

8Q. In what city?

A. Washington, D. C. That is where his office is. He lives in Hyattsville, Maryland.

9Q. Have you an office of the partnership in Washington? A. We do.

10Q. Are you acquainted with Joseph Hayes or Hayes Brothers? A. Very well.

11Q. How long have you known Mr. Hayes?

A. I would say since about 1923 or 1924 when I became a member of the Sciencetech Club. He was then an active member of it, and still is, I believe, and so am I.

12Q. Did Mr. Hayes ever consult you professionally in regard to a refrigerating or water defrosting unit?

A. He did.

13Q. When was that?

A. I would say it was after lunch in the afternoon. [609] I cannot give the day without referring to my diary. I have a memorandum of that date in September, 1934.

14Q. Will you produce your diary and refer to it and refresh your recollection.

A. It was Wednesday, September 5, 1934.

Mr. Lyon: May I see, please, what the witness is referring to.

15Q. What are you referring to?

(Deposition of Elmer LeGrand Goldsmith)

A. I am referring to my 1934 daily diary.

Mr. Lyon: Let me see it, please.

16Q. Is this a photostatic copy of your September 5, 1934 daily diary you have just referred to?

A. That is correct.

Mr. Neave: I offer it in evidence as Plaintiff's Exhibit 24.

(Plaintiff's Exhibit 24, so offered in evidence, is attached to these depositions.)

17Q. What did the entry in your diary mean?

A. It means that Joe Hayes disclosed to me an invention and that he asked that a preliminary search be made, which search is made by Mr. Galt in Washington, that being a part of our partnership agreement.

18Q. Did you write to Mr. Galt in regard to a search that was to be made for Mr. Hayes?

A. I did. [610]

19Q. I show you a photostat of a letter dated September 5, 1934, to Dwight D. Galt, and ask you what that letter is, whether you recognize it?

A. This is a 5-page letter, written by my then secretary Ann M. Kramer, and my numeral is shown as No. 4. It is signed "ELG", those being my initials.

20Q. Did you sign those initials?

A. I did, sir. On page 3, the third line, the third last word, it is my correction. I cannot tell whether it was made in ink or pencil from this photostat. In the fifth line, the word "coil" was stricken out by me. The two words, "when cooling" was added by me either in pen or pencil. In the second line of the next paragraph the tense of the verb was changed from "then are" to "may be". In the second last line I inserted, "and eliminates

(Deposition of Elmer LeGrand Goldsmith)

frosting". Again, on page 4, I cannot tell whether I am the one that underscored "deluge type defroster",—and I might add "deluge" was Joe Hayes term for the arrangement—but the addition to the sentence, "prevention of ice blocks freezing together" is in my handwriting. The insertion, "that", in the following paragraph also is in my handwriting.

21Q. The letter seems to refer to certain drawings. Have you the drawings? A. I do not.

22Q. Have you your office copy of this original letter? [611] A. I do not.

23Q. Is the original letter in your possession?

A. It is not.

24Q. How does it happen that you do not have the copy of this letter or the drawings?

A. I might explain it this way: we are very cramped for storage space, and periodically we go through our files and strip them, and I believe that about three or four years ago we took out everything from the files of the miscellaneous A to Z, such as relate to casual clients, and discarded them so we would have more space in our files. That leaves only in our files at the present time from 1935 on.

Mr. Neave: I ask that this letter of September 5, 1934 be marked as Plaintiff's Exhibit 25 for identification.

25Q. Did you receive any reply from Mr. Galt to your letter of September 20th?

A. My letter was not dated September 20th.

26Q. I beg your pardon,—your letter dated September 5th, Plaintiff's Exhibit 25.

A. Yes. It was Mr. Galt's custom to report back to us anywhere from ten days to two weeks, and then we report to the client.

(Deposition of Elmer LeGrand Goldsmith)

27Q. I show you a photostat of a copy of the letter dated September 20, 1934, and ask you if you can identify it?

A. I can identify it to this extent, that I believe it [612] is a carbon copy, and possibly one from Mr. Galt's files, of the original letter which came to me probably two or three days after its date as shown here, September 20, 1934, and it is the official report from him on my search sent to him by my letter of the 5th.

28Q. Have you the original of this letter in your files?

A. I do not. That was attached to the drawings and the carbon of my letter to Mr. Galt, it being his practice to send with his report all inclosures, including drawings, except the original letter of transmittal, and that he retained in his file. That is his practice and ours.

Mr. Neave: I will ask that the Galt letter of September 20, 1934, be marked as Plaintiff's Exhibit 26, for identification.

29Q. Did you render to Mr. Joseph Hayes any report after receiving Mr. Galt's letter of September 20, 1934?

A. That is my custom, and I feel certain that I did. However, that carbon of the report so rendered also was thrown away when we thinned out our files.

30Q. I show you a letter on the letterhead of Lockwood, Goldsmith & Galt, dated September 24, 1934, purporting to have been signed by Elmer L. Goldsmith, and ask you whether you recognize your signature, and whether or not this is the report which you made to Joseph Hayes?

A. May I see the Galt report to me? This is a letter [613] which I dictated to my secretary, Mrs. Kramer, whose initials appear on page 2, at the bottom, and my

(Deposition of Elmer LeGrand Goldsmith)

No. 4 again appears, the signature is mine, and I find quoted at the top of the page an abstract taken from Mr. Galt's report to me of the 20th. This letter is dated September 24, 1934, on our letterhead, and lists the patents by name, number, and date, which are referred to in his report by number only.

Mr. Neave: I ask that this letter from Mr. Goldsmith to Mr. Hayes, dated September 24, 1934, be marked for identification as Plaintiff's Exhibit 27.

31Q. Did you render any bill to Mr. Hayes for the work that you did for him in connection with the report which you rendered, as shown in Plaintiff's Exhibit 27?

A. Yes, we did.

32Q. Can you produce the bill or any copy of it?

A. I cannot produce the bill because that went to the client, but I can produce our office copy.

33Q. Will you do so, please, and compare the photostat I am handing you to see whether it is a correct copy of the original?

A. The photostat is a true copy of the bill to Mr. Hayes, dated October 1, 1934, referring to his search on September 5, 1934, and giving the amount of the bill, but it does not show the perforations that the original copy, not the original bill, would normally show. However, there is a mark [614] on there that does not show in the copy, and which I am unable to explain, and that can read, "1" a mark, and "4." That may be an "and" sign. I do not know what that means. The letters, "Pd. 10/8", I recognize the handwriting of Orpha McLaughlin, who is now Mrs. Mark Pangborn, of this city, and shows that Joe Hayes paid this bill on the 8th of October, Joe Hayes having established credit in our office. That is why he

(Deposition of Elmer LeGrand Goldsmith)

was not billed on that particular day that he ordered the search.

Mr. Neave: I offer in evidence photostatic copy of the copy of the bill to Mr. Joseph Hayes, dated October 1, 1934, as Plaintiff's Exhibit 28.

(Plaintiff's Exhibit No. 28, so offered in evidence, is attached to these depositions.)

34Q. Did you ever file a patent application on this disclosure for Mr. Hayes? A. Our firm did not.

Mr. Neave: You may cross-examine, Mr. Lyon.

Cross Examination

By Mr. Lewis Lyon:

35Q. How does it come, Mr. Goldsmith, that you are able to produce some portions of this record and some portions you are not able to produce at the present time, including the sketch or drawing that purportedly accompanied your letter of September 5, 1934, to Mr. Galt? [615]

A. I presume that the photostat copy of my original letter of transmittal to Mr. Galt was photostated and was produced and submitted to me for identification today. I believe he has all his files because he has a large garage in Hyattsville, and I think he keeps them out there. However, the drawing which accompanied that letter, and the carbon of my letter to Joe Hayes in response to that report, and the original letter of Mr. Galt to me reporting on the search, were thrown out three or four years ago when we stripped our files for more space.

36Q. Where did these particular copies come from then, Mr. Goldsmith, or are they copies?

(Deposition of Elmer LeGrand Goldsmith)

Mr. Neave: I might make a statement on the record here to shorten the examination I obtained photostatic copies of Plaintiff's Exhibit 25 from Mr. Galt. I have asked Mr. Galt whether he would be willing to come to Chicago and testify concerning this letter and Plaintiff's Exhibit 26, a photostatic copy of which I also obtained from him, in the event Mr. Lyon would not stipulate that these photostats might stand as the originals. I have with me here a letter from Mr. Galt in which he stated that a copy of a proposed stipulation which I had drawn up and had sent to him was correct, but that he would come to Chicago if it were necessary. The photostat, Plaintiff's Exhibit No. 27, was taken of the original of the letter in the files of Hayes Brothers, which [616] original will be produced tomorrow by a duly qualified witness.

A. I believe, Mr. Lyon, that answers your question. I would have surmised they were taken from the original sources in whose possession they have been.

37Q. What I am trying to find out, frankly, is where is this sketch that is supposed to accompany Exhibit 25 for identification?

A. That sketch was returned to me by Mr. Galt. He never mentions in his letters he is returning inclosures, as far as I can recall, but they always come back to the office here when they are sent down there. He retains only the original letter of transmittal.

38Q. Where is the sketch at the present time then?

A. You know as well as I do. I said it was stripped from our files, and the custom is in this building when any material is thrown out it is placed out in the halls in large piles. They get a truck and take it down in the basement, and then they bale it, and then it is sold as waste paper.

(Deposition of Elmer LeGrand Goldsmith)

39Q. Then you are certain that you do not have, nor does Mr. Galt have, nor does Mr. Hayes have a sketch?

A. I cannot speak for Mr. Hayes, but I am positive Mr. Galt does not have it and I am positive it is not in our files, or I would produce it.

40Q. Did you ever hear anything from Mr. Hayes in response to your letter to him of September 24, 1934? [617]

A. No, because Joe Hayes was at that time not in the best of health, and he usually leaves—still does, in fact—he usually leaves Indianapolis late in the fall and does not return until in the early spring; he goes to Florida practically every year. I would not say positively he has gone every year, but I would say that is his general practice. He is over 70 at the present time.

41Q. You never had any reply then from Mr. Joseph Hayes to your letter of September 24, 1934?

A. Nothing, unless I saw him at the Columbia Club or the Sciencetech Club and commented on what was he going to do about it, or something like that, but I have no recollection I ever raised the question. A search was made and a report was rendered. So far as my records show, that concludes the transaction.

42Q. Were you acting as attorney for the Frick people at the time you wrote this letter?

A. I was not. I was acting as Joe Hayes' personal attorney.

43Q. I mean outside of this particular communication, were you also employed by the Frick people?

A. I never heard of the Frick people. If I may have mentioned it in the letter there it was because Joe Hayes

(Deposition of Elmer LeGrand Goldsmith)

had repeated the matter to me. I have never been employed by the Frick people, so far as I know, or our firm. [618]

44Q. Then you statement in this letter of September 5, 1934 which says, "The Frick people, who have seen this device", etc., was a matter that was merely told you by Mr. Hayes, is that correct?

A. That is correct. And there are a lot of other statements in that letter that contain the same type of hearsay evidence or background.

45Q. By whom are you employed at the present time in this matter, Mr. Goldsmith?

A. Mr. Loeffel employed me when this matter first was brought to my attention again.

46Q. Mr. Loeffel of the Marlo Coil Company?

A. That is correct, and all bills have been rendered to the Marlo Coil Company.

47Q. And you are being compensated by the Marlo Coil Company for your services in giving this testimony?

A. I am not.

48Q. You expect to be?

A. I hope to enter a time charge.

49Q. To the Marlo Coil Company?

A. That is correct.

Mr. Lyon: That is all.

Redirect Examination

By Mr. Neave:

50Q. Do I understand from your cross examination that [619] the description contained in your letter of September 5, 1934, Plaintiff's Exhibit 25, is a statement of the disclosure that was made to you by Mr. Joseph Hayes?

(Deposition of Elmer LeGrand Goldsmith)

Mr. Lyon: Objected to as leading.

A. That is correct.

Mr. Neave: That is all, Mr. Goldsmith.

And further deponent saith not.

Mr. Neave: It is hereby stipulated by and between the parties hereto by their counsel, that if Dwight B. Galt were called as a witness of behalf of plaintiff in this case he would testify as follows:

(1) That he is a patent attorney, with an office in Washington, D. C., and the partner of Elmer L. Goldsmith a patent attorney with an office in Indianapolis, Indiana.

(2) That on September 8, 1934 he received at his affice in Washington, D. C., a letter from Elmer L. Goldsmith, Indianapolis, Indiana, dated September 5, 1934, an exact photostatic copy of which is Plaintiff's Exhibit 25.

(3) That on September 20, 1934, in reply to said letter of September 5, 1934, he wrote a letter to Elmer L. Goldsmith, an exact photostatic copy of a carbon of which is Plaintiff's Exhibit 26.

(4) That said letter of September 5, 1934 and said carbon copy of reply dated September 20, 1934, have been and still are in his possession in his office files in Washington, D. C. [620]

Mr. Lyon: It is so stipulated.

Mr. Neave: I offer in evidence Plaintiff's Exhibits 25 and 26.

(Plaintiff's Exhibits 25 and 26, so offered in evidence, are attached to these depositions.)

Mr. Neave: The next witness is Mr. Stage, Charles E. Stage.

The Court: Are you skipping Simons?

Mr. Neave: Yes, skipping Simons.

The Court: You are not offering that?

Mr. Neave: Not offering that.

Mr. Lewis Lyon: Your Honor, I would like to offer the deposition of Earl Charles Simons, and I would like to read the cross examination.

The Court: You will have to read the direct then before the cross gets in.

Mr. Lewis Lyon: Then I will read the direct.

EARL CHARLES SIMONS,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, relating to said cause, deposes and says:

Direct Examination

By Mr. Neave:

1Q. What is your full name? [621]

A. Earl Charles Simons.

2Q. What is your residence address?

A. 944 North Tacoma.

3Q. That is in Indianapolis?

A. Indianapolis.

4Q. Will you state whether or not you and your father leased the premises of the Polar Ice Company on the corner of 10th and Tacoma Streets in Indianapolis from approximately October, 1936 until at least October, 1940?

A. Yes, but it was in April, 1936.

5Q. Was it April, 1936? A. Yes.

(Deposition of Earl Charles Simons)

6Q. I show you Plaintiff's Exhibits 18, 19, 20 and 21, and ask you whether each of those exhibits shows the premises which you leased from the Polar Company?

A. Yes, that is the same thing.

7Q. Referring to Plaintiff's Exhibit 21, will you tell me when you took over the lease in 1936 whether or not the arrangement of the piping and valves was as shown in this Exhibit 21?

A. As far as I know, they are the same; there has never been any changes made.

Cross Examination

By Mr. Lewis Lyon:

8Q. Mr. Simons, were you present when these photographs, [622] Exhibits 18, 19, 20 and 21 were taken?

A. Yes.

9Q. Who else was present?

A. Well, I cannot recall the man's name. This man was there.

Mr. Lyon: Pointing to Mr. A. G. Loeffel.

10Q. Anyone else?

A. And this man was there, you were there that time. (Pointing to Mr. Neave.) And there was some men from Hayes Brothers that was there. I cannot recall who else; I don't recall the names.

11Q. Has it been your practice since leasing this premises and this ice room to keep in that room not only ice but fresh milk, soft drinks, and other like commodities?

A. Well, yes.

12Q. I believe, Mr. Simons, that I in company with Mr. Hy Jarvis called at your place yesterday noon, did we not?

A. That is right.

(Deposition of Earl Charles Simons)

13Q. And at that time we took a temperature reading of the temperature inside the room on thermometer, and that thermometer showed the temperature in the room was a little over 33 degrees Fahrenheit. Isn't that correct?

A. That is right.

14Q. And there were in the room, besides what is shown in these photographs, an ice conveyor connected with a coin- [623] operated ice dispensing machine, isn't that correct?

A. That is right.

15Q. And on that conveyor at the time I was there there were pieces of ice of about 25 pounds, is that correct?

A. Twenty-five and fifty.

16Q. And those pieces of ice in the room were not frozen together, were they?

A. No.

17Q. And they were in a suitable condition for dispensing through that dispensing machine, were they not?

A. That is right.

18Q. Directly under the ceiling coil, as illustrated in Plaintiff's Exhibit 19, there were three cases of soft drinks, including one or more cases of Coca-Cola, were there not? Exhibit 19 is this one. Directly under that cooling coil on the floor there was three cases of these soft drinks, were there not?

A. Yes. We keep them there.

19Q. And in the opposite end of the room, I mean opposite from the ceiling coil, and in the portion not shown of the room as the room is illustrated in Plaintiff's Exhibit 18, there was fresh milk stored. Isn't that true?

A. That is right.

20Q. And you told me that that had been your custom to store such articles for the entire period that you had had [624] possession of this storage room. Isn't that correct?

(Deposition of Earl Charles Simons)

A. Well, we haven't handled milk ever since we have handled that station, but we have always had soft drinks.

21Q. How long have you stored milk in there?

A. Well, I would say in the last, oh, four years.

22Q. That is during the entire year?

A. Yes, the year 'round.

23Q. At the time we were there we inspected the water rot of the inside wall structure, the water rot as illustrated by the letter "W" and arrows in Plaintiff's Exhibit 19, and as it is also illustrated by the arrow "AA" in Plaintiff's Exhibit 18, did we not? A. That is right.

24Q. And that is water rot, is it not? A. It was.

25Q. And to your knowledge, that water rot condition has been prevalent in that ice room since you first leased the premises. Is that correct?

A. No, it was not that bad.

26Q. It has been getting progressively worse?

A. Yes.

27Q. But it was there when you first leased the premises? A. That is right.

28Q. It is a fact, is it not, Mr. Simons, that during the operation of this structure which you state you have [625] leased from the Polar Ice & Fuel Company, that you have had occasions when the spray pipes in the ceiling coil unit, as illustrated in Plaintiff's Exhibit 19, froze up, isn't that true?

A. Well, they have stuck some, yes, before I learned how to defrost it right.

29Q. And in order to get that sticking, as you say, or freezing up condition eliminated you turned off the condenser and compressor unit, as that structure is illustrated

(Deposition of Earl Charles Simons)

in Plaintiff's Exhibit 21 in front of you, and allowed the temperature of the coil to reach the temperature of the room, which eliminated the stuck or frozen up condition. Isn't that correct? A. That is right.

30Q. It is also true, is it not, Mr. Simons, in viewing Plaintiff's Exhibit No. 19, as we inspected the structure yesterday, that the point "L" of the pipe "B", is higher than the point "M" of that same pipe "B"?

A. Yes.

31Q. And it is also true that this pipe "A" is similarly inclined between the points "R" and "S", isn't that true; that is, that the point "R" is higher than the point "S"?

A. I don't know about that one, but I do know this one is.

32Q. During the winter months it has been your practice [626] to disconnect the refrigerating unit as illustrated in Plaintiff's Exhibit 21, and not to operate that unit. Isn't that correct? A. That is correct.

33Q. That is, maintaining a temperature in the storage room of approximately 33 degrees, as we saw it yesterday?

A. That is right.

34Q. And you endeavor to maintain through the use of the refrigerating machine a similar temperature during summer months, do you not? A. That is right.

35Q. During the time that you have been storing milk in this storage room for the last four years, as you have testified, you have not at any time found that milk frozen, have you? A. No.

36Q. And the same is true with respect to the soft drinks that you have stored in the room since you first took over the lease?

(Deposition of Earl Charles Simons)

A. Unless it is in the wintertime in real cold weather, sometimes it freezes down towards the vending machine there.

37Q. That is in the wintertime when you are not operating the unit? A. That is right.

38Q. But in summer months when you have operated the unit [627] you have never had the soft drinks freeze, have you? A. No.

39Q. Is it not a fact, Mr. Simons, that it is necessary to drain the water from this system in the shed which is outside of the storage room during the winter months to prevent water freezing in those pipes?

A. Well, now, I never take care of that. Polar always comes out every fall and disconnects all that, and why they disconnect it, I don't know. I never have a thing to do with that part of it.

40Q. But you do know if water was left in those pipes in that shed that the water would freeze?

A. That is right. It would freeze in there because there is no heat or anything in there.

Mr. Lyon: That is all.

The Court: Do you want to recess now until 2:00 o'clock?

Mr. Lewis Lyon: Yes, your Honor.

The Court: Very well. 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.) [628]

(Deposition of Earl Charles Simons)

Los Angeles, California, September 20, 1946, 2:00 o'clock p. m.

The Court: Ex parte?

The Clerk: No ex parte, your Honor. Further trial.

Mr. Lewis Lyon: I will go back to question 39, page 142, just to be sure, your Honor.

The Court: Very well.

39Q. Is it not a fact, Mr. Simons, that it is necessary to drain the water from this system in the shed which is outside of the storage room during the winter months to prevent water freezing in those pipes?

A. Well, now, I never take care of that. Polar always comes out every fall and disconnects all that, and why they disconnect it, I don't know. I never have a thing to do with that part of it.

40Q. But you do know if water was left in those pipes in that shed that the water would freeze?

A. That is right. It would freeze in there because there is no heat or anything in there.

Mr. Lyon: That is all.

Redirect Examination

By Br. Neave:

41Q. Mr. Simons, was the refrigerating unit operating yesterday when Mr. Lyon was out there?

A. No, sir.

42Q. What was the outdoor temperature yesterday, do you recall? A. I don't recall.

43Q. It what portion of the refrigerating room do you usually keep your milk?

A. Well, in the opposite end of the unit end.

(Deposition of Earl Charles Simons)

44Q. And that is true in the summer as well as the winter? A. That is right.

45Q. You testified that occasionally there was a stuck condition. When there is a stuck condition, did you use the water defrosting shower?

A. No; that is generally what froze up a little bit on me.

46Q. Did it run at all?

A. No, sometimes it wouldn't run at all. That was before I learned how to operate the machine, but after all, I don't know, it has been quite some time, but somebody told me how to do it, and if I may show it here—

47Q (Interposing) Yes. Is that Plaintiff's Exhibit No. 21?

A. Yes. I always turned this valve "8" up here to defrost the machine, and when I did that and shut it off here that always left water in this line, and naturally at some time it would stick up here on this machine up here, and when [630] it did that I would just turn off the compressor here and let the fan blow until it got all the frost off the coils, and then turn it back on.

Mr. Lyon: Let the record show in the last statement when the witness pointed to the exhibit he pointed to the top of the coil unit, as shown in Plaintiff's Exhibit 18.

48Q. Has this McQuay refrigerator unit, which is shown in Plaintiff's Exhibit 19, as being attached to the ceiling, has that sagged from the ceiling?

A. Well, it looks like it has to me.

49Q. Did you examine it yesterday? A. Yes.

50Q. How much is point "L" above point "M" as shown on Plaintiff's Exhibit 19?

A. I would say it is about an inch.

(Deposition of Earl Charles Simons)

51Q. Did you measure?

A. Measured it yesterday.

52Q. You testified as to the condition of the refrigeration room. Is it now in the same condition as it was in 1936?

A. You mean the walls and things like that?

53Q. Yes.

A. No, they are worse now than they were then.

Recross Examination

Q. By Mr. Lewis E. Lyon: 54Q Mr. Simons, in this [631] room is there a fairly even temperature maintained throughout the room during the time the unit is operating?

A. I would say so, yes.

Mr. Lyon: That is all.

By Mr. Neave:

55Q. What are the dimensions of the room, do you recall?

A. I don't recall.

56Q. What would be your best guess, your best estimate?

A. I would say it is about 25x15.

57Q. How high is the ceiling?

A. About six and a half foot, I would say.

Mr. Neave: That is all.

Mr. Neave: The next witness was Charles E. Stage, who was the office manager and in charge of the records of the Hayes Brothers, Inc., who sold the unit which we are claiming is a prior sale in this instance.

He produced Exhibit 27, which is the Goldsmith-Hayes letter of September 24, 1934, and he also produced the Hayes sketch which is Exhibit 29.

I offer the direct examination of this witness to be copied into the record.

There was no cross examination.

The Court: Very well.

Mr. Neave: There is also a stipulation on page 151 which [632] I ask be copied into the record. It relates to the sketch of Exhibit 29 to the effect that if Mr. Hayes were called as a witness he would testify that he made the sketch some time during the spring of 1934.

The Court: Very well.

CHARLES E. STAGE

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

Direct Examination

By Mr. Neave:

1Q. What is your full name, Mr. Stage?

A. Charles E. Stage.

2Q. Your residence address?

A. 452 North Dearborn Street, Indianapolis, Indiana.

3Q. Who are you employed by?

A. Hayes Brothers, Incorporated.

4Q. How long have you been employed by them?

A. Since March 5, 1923.

5Q. That is Hayes Brothers in Indianapolis?

A. Indianapolis, yes.

6Q. Are you the office manager and in charge of the office records? A. I am. [633]

7Q. I show you Plaintiff's Exhibit 17, which is a photostat of a carbon copy of a letter from Polar Ice &

(Deposition of Charles E. Stage)

Fuel Company to Hayes Brothers, dated May 2, 1934, and ask you whether you made a search at my request to see if you could find in the records of Hayes Brothers the original of this letter?

A. Is this the copy of the letter here?

8Q. This copy.

A. No, I couldn't find that letter at all; I couldn't find it anyplace.

9Q. I show you Plaintiff's Exhibit 27, which is a photostat copy of a letter dated September 24, 1934, from Elmer L. Goldsmith to Mr. Joseph Hayes, and ask you whether you looked in your records at my request to see if you could find the original of this letter, and if you found it, will you please produce it?

A. This is apparently the original of it right here that I found in Mr. Hayes' records.

10Q. The original you have produced of Plaintiff's Exhibit 27? A. That is right.

11Q. And that was in the files of Hayes Brothers?

A. That is right.

12Q. Is Mr. Joseph Hayes president of Hayes Brothers? A. Yes, sir. [634]

13Q. Where is he now?

A. He is vacationing in Florida, Miami, Florida.

14Q. Can you give me his address there?

A. 427 South West, 30th Road, Miami, 36, Florida.

15Q. At my request have you made a search of the records of Hayes Brothers to try to find any original sketches made by Mr. Hayes of a water defrosting installation? A. Yes, I have.

(Deposition of Charles E. Stage)

16Q. Could you produce anything that you found?

A. The only sketch I found was this sketch here.

Mr. Neave: I will ask that this sketch be marked as Plaintiff's Exhibit 29 for identification.

17Q. Are you familiar with the handwriting of Mr. Joseph Hayes? A. Yes, sir.

18Q. Can you tell me whether or not Plaintiff's Exhibit 29 was written by Mr. Joseph Hayes?

A. This is his handwriting.

19Q. Have you any personal knowledge as to when Plaintiff's Exhibit 29 was drawn or made, written and drawn?

A. No, I don't, unless he has a date on it here. I don't have any personal knowledge, though.

20Q. At my request, have you made a search of the records of Hayes Brothers to try to find any engineering [635] data or drawings of a refrigeration installation made by Hayes Brothers at the Polar Ice & Fuel Company service station at the corner of 10th and Tacoma Street?

A. Yes, sir, I have.

21Q. Did you find any?

A. I was unable to find any.

Mr. Neave: You may question.

Mr. Lyon: No cross examination.

Mr. Neave: It is hereby stipulated that the Notary may photostat or photograph Plaintiff's Exhibit 29, send a copy of the photostat or photograph to plaintiff and defendant's counsel, and mark a copy of the photostat or photograph as the original exhibit in evidence, returning the document offered in evidence today, to Mr. Stage, so it may be kept in the records of Hayes Brothers.

Mr. Lyon: That is satisfactory. In order to avoid any delay in these proceedings and any possibility of being required to go to Florida, I will stipulate if Mr. Hayes was called as a witness that he would testify he made this drawing or sketch, Plaintiff's Exhibit 29, and the accompanying writing, some time during the spring of 1934, if that is satisfactory.

Mr. Neave: That is satisfactory. I would like to offer in evidence Plaintiff's Exhibits 18, 19, 20, 21 and 27. [636]

(Plaintiff's Exhibits 18, 19, 20, 21 and 27, so offered in evidence, are attached to these depositions.)

Mr. Neave: The next witness was Charles Edward Martin, who leased the premises in 1934, and you will recall that it was Martin that Hays explained the operation of the unit when it was put it.

The Court: He so testified.

Mr. Neave: Yes. He identified the layout of the piping valves in plaintiff's Exhibits 18 to 21, and there was no cross examination.

I ask that this be copied into the record.

The Court: It may.

Mr. Lewis Lyon: There was no testimony about what the temperature of operation was.

Mr. Neave: That is correct.

The Court: From counsel's statement I assume that it was merely corroborate of the previous explanation of the layout which had been given.

Mr. Neave: That is correct, your Honor.

CHARLES EDWARD MARTIN

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says: [637]

Direct Examination

By Mr. Neave:

1Q. What is your full name, Mr. Martin?

A. Charles Edward Martin.

2Q. What is your residence address?

A. 921 College.

3Q. Indianapolis? A. Yes.

4Q. Did you lease from the Polar Ice & Fuel Company a service station at the corner of 10th and Tacoma in the year 1934? A. Yes, sir.

5Q. During the period of your lease was there any refrigeration equipment installed?

A. Yes, sir.

6Q. Did you have any complaint concerning that equipment after it was first installed?

A. Yes. We couldn't get it defrosted right, and they were going to take it out.

7Q. Did they take it out? A. No, sir.

8Q. What was done to the equipment?

A. They put the defroster on—Hayes Brothers did, and—

9Q. (Interposing) Have you finished your answer? [638]

A. They put the defroster on and we didn't have any more trouble.

10Q. What did the defroster consist of?

A. Water.

(Deposition of Charles Edward Martin)

11Q. Water sprays down over the coils?

A. Yes, sir.

12Q. I show you Plaintiff's Exhibits 18, 19, 20, and 21 and ask you whether or not they are views of the premises which you leased from the Polar Ice & Fuel Company? A. Yes, sir.

13Q. Referring to Plaintiff's Exhibit 21 and to the piping and valves shown in that exhibit, do you recall whether or not the piping and valves as they were in 1934 when you leased that building were arranged in the same manner and are the same type of piping and valves as those shown in Plaintiff's Exhibit 21?

A. This was all put in after I came there.

14Q. You mean the piping?

A. Yes, sir. It was not hooked up when I first went in the station.

15Q. While you were still there what was done?

A. They installed the unit and the piping after I was in there, and I don't see any changes in any of it; it looks all the same to me.

Mr. Neave: That is all. [639]

Mr. Lyon: That is all.

Mr. Neave: Plaintiff's Exhibits 18 and 19 are the photographs, and on them they bear an endorsement "July 21, 1944, Bass Photo Company, I. H. Schafer," and Exhibits 20 and 21 bear a similar endorsement except that the date July 24, 1944, is there. I find that there is no stipulation that these photographs were taken on those dates as indicated on the photographs, and I ask Mr. Lyon whether he will not stipulate to that.

Mr. Lewis Lyon: Do you say that is when they were taken?

Mr. Neave: Yes.

Mr. Lyon: So stipulated.

The Court: Very well. Stipulation approved.

Does that finish the Indianapolis matter?

Mr. Neave: That finishes the Indianapolis matter.

I offer in evidence Exhibits 13 to 29 inclusive, which are the Indianapolis exhibits, your Honor.

The Court: Admitted.

(Plaintiff's Exhibits 13 to 29 inclusive, respectively, received in evidence.)

[Note: Plaintiff's Exhibits Nos. 13 to 21 and 23 to 29 will be found in the Book of Exhibits at pages 1127 to 1138 and 1139 to 1151.]

Mr. Lewis Lyon: We will offer Exhibit A, the sketch, attached to the deposition.

The Court: The depositions as read and referred to as taken, together with all the exhibits offered by either party [640] or both parties or each party or all parties are admitted.

(Defendant's Exhibit A received in evidence.)

[Note: Defendant's Exhibit A to Deposition of Witness Barton will be found in the Book of Exhibits at page 1547.]

Mr. Neave: The next series of depositions relates your Honor, to a prior use of the Illinois Steel Company at its South Works plant in Chicago. This is a dry blast

system somewhat along the lines of the one which we have previously seen.

I ask that the reporter copy into the record the stipulation which is contained on pages 2 and 3 of the depositions, just before the deposition of Nicholas L. Tominac.

It Is Stipulated by and between the parties by their counsel:

1. That the hearings in Chicago are held pursuant to notice served upon the defendant, and now before the Notary, Miss E. M. Franklin.

2. That the provision of Rule 26 (a) of the Federal Rules of Civil Procedure that depositions taken prior to service of answer shall be by leave of the court, is hereby waived.

3. That the witnesses shall be sworn by Miss E. M. Franklin, who is fully qualified under the provision of Rule 28, Sections (a) and (c) of the aforementioned Rules.

4. That the testimony given here shall be taken stenographically and transcribed by Miss E. M. Franklin. [641]

5. That the testimony, when transcribed, shall be submitted to the witness for examination and shall be read to or by him, and any changes in form or substance which the witness desires to make shall be entered upon the deposition by Miss E. M. Franklin, with a statement of the reasons given by the witness for making them.

6. That the signing of the depositions as read and corrected by the witness is hereby waived.

7. That Miss E. M. Franklin, after duly certifying the depositions, shall send them by registered mail to the Clerk of the District Court of the United States, Southern District of California, Central Division, for filing.

8. That the cost of the original transcript, exhibits, attendance fees and Notary's fees shall be borne in the first instance by plaintiff, but shall be eventually charged as taxable costs to the losing party.

NICHOLAS L. TOMINAC

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Neave:

Q1. Mr. Tominac, would you give us your full name?

A. Nicholas L. Tominac; T-o-m-i-n-a-c.

Q2. Where is your residence?

A. 9720 Commercial Avenue, South Chicago, Illinois. [642]

Q3. Where are you employed at present?

A. I am at present employed by the Carnegie-Illinois Steel Company.

Q4. What is your occupation?

A. Now I am a tool welder.

Q5. How long have you been employed by Carnegie-Illinois Steel Company, or its predecessor?

A. Since 1906. At that time it was Illinois Steel, not Carnegie.

Q6. What was your job when you joined the Illinois Steel Company in 1906?

A. I was a handyman in the steel works.

Q7. What was your next job with the Steel Company?

A. My next job was at the dry blast plant. That plant started building in the summer of 1906 and was finished in the fall of 1907, and I was given a job as a second engineer, that was my title, but I had charge of all the defrosting.

(Deposition of Nicholas L. Tominac)

Q8. Who were your immediate superiors?

A. Mr. Charles Leinert, he was the Chief Engineer, and the Assistant Chief was Mr. Albert Gaide.

Q9. Is Mr. Leinert still alive?

A. No. Mr. Leinert is dead.

Q10. How about Mr. Gaide?

A. Mr. Gaide is still living.

Q11. How long did you remain on this job? [643]

A. I remained on this job until they shut the plant down. That was about 1911 or 1912, something like that.

Q12. What is the purpose of a dry blast plant?

A. The purpose of a dry blast plant is to dehumidify the air or I had better say freeze the moisture out of the air to be used in the blast furnace department.

Q13. What did the dry blast plant consist of in the way of buildings?

A. First, was an engine room or compressor and a brine pump room, brine cooling room and refrigerator room.

Q14. Can you describe in a short manner what generally took place in each of these rooms?

A. Well, in the engine room the ammonia was compressed and sent up to ammonia condensers where it was cooled off and came back down there in a brine which goes through the coils and refrigerators to freeze the air.

Q15. What happened in the refrigerator building?

A. In the refrigerator building the air was going through the coils to freeze all the moisture out of the air, or better stated, to dehumidate it. The air was taken from the outside and blown into the fan, into the tunnel.

(Deposition of Nicholas L. Tominac)

Q16. Where was this tunnel?

A. The tunnel was down beneath the refrigeration building. In that tunnel there were seven doors, seven shutters, and each one of these shutters was open while the re- [644] frigerator was in good working condition, or working.

Q17. Where did these shutters lead the air to?

A. The shutters lead the air to the coils, and it goes right through the coils up to the suction opening which was on the top, two suction openings on the top.

Q18. Was the refrigerator building a big room, or was it divided up?

A. That was divided in seven compartments. There was pipes in each compartment.

Q19. Now, these pipes that you referred to, what did they have in them?

A. The pipes had a brine in there.

Q20. And what was the purpose of the brine?

A. The brine was to cool off the air.

Q21. Where did the air go to after it passed through these brine pipes?

A. It went right into the intake on the right of the last floor.

Q22. Is that the top floor?

A. The top floor.

Q23. And where did it go to from the top floor?

A. It goes from the top floor to the blast furnace department.

Q24. You mentioned that you were in charge of defrosting? [645]

A. Yes, sir.

(Deposition of Nicholas L. Tominac)

Q25. How was this defrosting accomplished?

A. The defrosting was done once every day to each compartment. Seven days a week, seven compartments. A compartment a day.

Q26. How was the defrosting accomplished?

A. Well, first I went down in the tunnel and shut off the intake of the air. Then I went up to the top floor and shut the shutters on the outgoing air.

Q27. Is that one compartment or for all compartments?

A. One compartment only.

Q28. One compartment that you would defrost?

A. Yes, that you would defrost.

Q29. All right.

A. Then I would pump the brine out of the whole system, out of all the pipes in that compartment. When that was done, I opened up the water valves and let the water play from the sprays right on top of the cooler and defrost it.

Q30. You are referring to sprays on top of the coils?

A. Yes, sir.

Q31. What was the piping system that was connected with these sprays?

A. Well, the main line was a 6-inch line, and that line come from the ammonia condenser. That was the cooling of compressed ammonia, the cooling water from compressed [646] ammonia.

Q32. Now, Mr. Tominac, do I understand from your statement that water was showered over the ammonia condenser coils and collected beneath the coils?

A. Collected on the bottom of the coils.

(Deposition of Nicholas L. Tominac)

Q33. And it was the water that was collected at the bottom of the coils after it had been over the ammonia condenser coils that went into the 6-inch pipe?

A. Correct.

Q34. Good. Now, where did the 6-inch pipe leading from the ammonia condenser go?

A. That led to the refrigerator building.

Q35. Was the refrigerator building next to the ammonia condenser building?

A. No, sir. It was right next to the brine cooler, and brine pump building.

Q36. So that the 6-inch pipe went from the ammonia condenser building over to the refrigerator building through the brine room?

A. They have a catwalk where the pipe was laying, and it was leading to the refrigeration room.

Q37. Now, as I understand it, you stated that you turned on the water in the water pipes that would lead the water to the spray headers, and the water would then defrost the brine, the brine pipes, is that correct? [647]

A. Correct.

Q38. Where did you turn on this water?

A. I had a main valve that was right in the hallway leading into the refrigerator room. There was an individual valve in each one of the compartments.

Q39. Was that in addition to the main valve?

A. Correct.

Q40. Tell me how long did it take to defrost the coils?

A. It all depends on how much frost or ice was on the pipes. It took as an average from three and one-half to five and one-half hours. That included pumping the brine and returning the brine into the compartments.

(Deposition of Nicholas L. Tominac)

Q41. How long would you think that would take to pump out the brine and pump it back again?

A. Forty minutes, and it took about twenty minutes to return the brine back again.

Q42. After the pipes had been defrosted, what did you then do?

A. After the defrosting I first shut off the main and shut off the 6-inch valve and opened up the 2-inch drain to drain the line.

Q43. When you opened this 2-inch drain, what line did that drain?

A. That drained all the line that was inside the building. [648]

Q44. The water pipe line?

A. The water pipe line, correct.

Q45. How often were these coils defrosted?

A. The defrosting was done days only, I started about ten o'clock in the morning and I was through around three o'clock in the afternoon, complete with everything. While I defrosted one compartment the other six compartments was in use, was working.

Q46. Who did the actual defrosting?

A. Myself.

Q47. After you had let the water out of the pipes by opening the valve in the drain, what did you do with respect to the shutters at the bottom and the top which you had closed?

A. I first would go down to the tunnel and open the shutters on the bottom, and let the air come in to dry the coils. After the coils were dried up I went to the engine room and notified the engineer that I am ready to put the brine back into the circulation. He says to me, "Okay."

(Deposition of Nicholas L. Tominac)

I went on and put the brine back in. Then I would go out when everything was ready and open up the shutters on the top to let the air go through again back to the blast furnaces.

Q48. You referred to opening a drain to drain the water out of the piping system in the refrigerator building. When you opened the valve on the drain line, did you leave that [649] valve open or closed?

A. Most of the time I would leave it open, but occasionally I shut it.

Q49. I show you a photograph marked R 119 5/2/16. I have marked on this picture an A with an arrow to a building.

A. Yes, sir.

Q50. Can you tell me what that building was?

A. This was the ammonia compressor building on the bottom, and on the top the ammonia condensers.

Q51. Of what plant?

A. Of the dry blast plant.

Q52. At the Illinois Steel Company.

A. Correct. The next building—

Q53. Excuse me just a minute.

A. All right.

Q54. And at what time are you speaking of, what year? Was it when you were working there?

A. Yes, I was working there; correct.

Q55. While the dry blast plant was in operation?

A. Correct.

Q56. I am marking B on the picture and ask you what that building is.

A. This is the brine pump room in the front and in the back is the brine cooling room.

(Deposition of Nicholas L. Tominac)

Q57. And I am marking C on the building on the left of [650] the picture. What is that?

A. That is the refrigeration building.

Q58. I have placed a D on the picture pointing to a pipe. Will you tell me what that pipe was?

A. This is that 6-inch line, water line, leading from the ammonia condenser, water for defrosting in the refrigerator building.

Q59. Is that the pipe which comes from building A?

A. Correct.

Q60. To building C? A. Correct.

Q61. I have marked E on the picture, with an arrow. Will you tell me to what object this arrow points?

A. The arrow points to the refrigeration building.

Q62. That is not a very good arrow, I can see.

A. No. You mean right in here (indicating)?

Q63. Yes.

A. Well, this is the 2-inch drain line.

Q64. Drain from where?

A. Drain from the refrigeration room 6-inch line.

Mr. Neave: Will the Notary please mark this as Plaintiff's Exhibit 30, for identification.

(Said photograph was marked for identification.)

Q65. I show you a drawing entitled "Dry Blast Plant Refrigerator Building 6" thawing-out water line. Illinois [651] Steel Co. South Works," which bears the No. 12406, and ask you whether or not it illustrates generally the water piping system in the dry blast plant which you have described in your testimony and which you tended while you were with the company?

(Deposition of Nicholas L. Tominac)

A. Everything is correct except the main water line, the valve. The valve is supposed to be here (indicating).

Q66. Where are you pointing on the drawing?

A. Is that the catwalk up here (indicating)?

Q67. Let us identify the building. A. Yes.

Q68. You are pointing to the drawing, on the right-hand side of drawing 12406 which figure is entitled "Brine Cooler Building," and you were pointing at a valve marked A? A. Correct.

Q69. Now, you say that is not correct?

A. That valve was inside the building, in the hallway.

Q70. Inside which building?

A. Inside the refrigeration building in that hallway.

Q71. Do you see the building on the right of the catwalk as you face this picture?

A. On the right, correct.

Q72. That is, the compressor building is on the left and the refrigerator building is on the right of this view?

A. On this view, correct. In here at this point [652] (indicating).

Mr. Neave: Just a moment. The witness is pointing to the right side of the figure entitled "Brine Cooler Building," approximately at the point marked with N on the side.

The Witness: On this side, correct.

Q73. What do you mean by "on this side"?

A. The valve in here, what shows on the photographic copy there was inside instead of outside, so was the drain in the hallway. Not in the compartment, just in the hallway going into the compartment.

(Deposition of Nicholas L. Tominac)

Q74. You are talking about the water valve and the drain valve? A. Correct.

Q75. There were two valves? A. Correct.

Q76. And they were both inside the refrigerator building.

A. Inside the hallway, in the refrigeration building.

Q77. But inside the hallway? A. Correct.

Q78. Were there any brine coils in the hallway?

A. No, absolutely not.

Q79. Was the hallway shut off from the brine coils?

A. Yes.

Q80. From the cooling compartments? [653]

A. Yes.

Q81. Have you any knowledge of what the outlet air temperatures were from the compartments that were in use?

A. Well, between 25 and 28 degrees Fahrenheit.

Mr. Neave: I ask that the drawing 12406 concerning which the witness has testified be marked for identification as Plaintiff's Exhibit 31.

(Said drawing was marked for identification.)

Q82. Do you know Alfred E. Mueller, M-u-e-l-l-e-r?

A. Yes, sir.

Q83. Who is he?

A. He was an engineer of the dry blast plant.

Q84. Was he working on the dry blast plant at the same time that you were? A. Yes, sir.

Mr. Neave: All right, Mr. Lyon.

(Deposition of Nicholas L. Tominac)

Cross Examination

By Mr. Lyon:

XQ85. How long, Mr. Tominac, has it been since you saw this dry blast air cooling operation?

A. What do you mean?

XQ86. How long ago was it that you last saw this operation?

A. Well, that is a good many years back. It was around 1912, 1911, or something like that. [654]

XQ87. And I understood you to say that that operation was discontinued at that time?

A. Yes, sir.

XQ88. And the building torn down?

A. Yes, sir.

XQ89. And the apparatus dismantled?

A. Yes, sir.

XQ90. So far as you know there was never any further use of it?

A. There was only one building and that was the compressor building, and they are using that now for a physical laboratory.

XQ91. Did you ever see this drawing which has been shown you here today, and which is marked Exhibit 31, for identification, before it was presented to you today?

A. Yes, sir.

XQ92. When?

A. I saw that two months ago, something like that.

XQ93. Where?

A. At the Carnegie-Illinois Steel.

(Deposition of Nicholas L. Tominac)

XQ94. Who showed it to you?

A. Mr. McCarthy.

XQ95. And who was Mr. McCarthy?

A. Mr. McCarthy was a consulting engineer, I guess, that is the way I know.

XQ96. That is what he told you, was it? [655]

A. That is what his title was on the letter.

XQ97. On what letter?

A. On his letter he wrote to me that he wanted to see me.

XQ98. You have that letter?

A. No, I have not it here. I can bring it or send it over whenever you want it.

XQ99. I would like to have it brought over.

A. Yes, sir.

XQ100. Will you do that? A. Yes, sir.

Mr. Neave: Do you want him to bring it personally or, send it?

Mr. Lyon: He can send it.

The Witness: I have the letter, I guess. I can send it over to you.

Mr. Neave: Why don't you send it?

The Witness: Okay.

Mr. Lewis Lyon: That letter I believe was sent. The letter was marked as Defendant's Exhibit B, your Honor, and I would ask that it be included in the deposition at this point.

The Court: Very well.

(The document referred to is, in words and figures as [656] follows, to wit:)

COPY OF DEFENDANT'S EXHIBIT B

Schwarz, Hughes & McCarthy

Consulting Engineers

225 Broadway

New York City 7

Barclay 7-0657

Elmer H. Schwarz

Edward R. Hughes

John S. McCarthy

October 11, 1944

Mr. Nicholas L. Tominac,

9720 Commercial Avenue,

South Chicago, Ill.

Dear Mr. Tominac:

Regarding the patent suit about which I interviewed you several weeks ago, the lawyer for the New York corporation which is being sued and which I am representing will be in Chicago on October 26th next, and would like to talk to you before he takes your testimony some time later.

I expect to be in Chicago on October 24th or 25th and will discuss the subject with you further at that time. I am writing you now so that you can arrange to meet the New York company's lawyer at the Stevens House some time on Thursday, October 26th, preferably early in the afternoon, and I am writing you now so that you can make arrangements to be absent from your work at that time. Of course I will recompense [657] you for any time lost or expenses incurred in connectiaon with the proposed conference.

Very truly yours,

J. S. McCarthy

JSM:EH

(Deposition of Nicholas L. Tominac)

By Mr. Lyon:

XQ101 Mr. McCarthy at that time showed you this drawing, Exhibit 31, for identification, did he?

A. Yes, sir.

XQ102. Was anyone else present?

A. Only a couple of fellows that work in the babbitt shop.

XQ103. And who were they?

A. Babbitt men, but there was only us two together when we worked over it. They were in the building when he showed it to me.

XQ104. But they were not present when Mr. McCarthy showed you this drawing? A. No.

XQ105. Did he point out to you on this drawing the fact that the pipes were not indicated correctly on the drawing? A. No, sir.

XQ106. Who did? A. Myself. [658]

XQ107. You mean you pointed it out to him?

A. I pointed it out to him, just exactly the way I thought by myself, I know it.

XQ108. Are you familiar and can you read a drawing. A. To a certain extent.

XQ109. The only time that you have seen this drawing before today then is about two months ago when it was shown to you by Mr. McCarthy?

A. Correct.

XQ110. You never saw it at the time that you were working, as you state, on the dry blast air cooling system?

A. No, sir.

XQ111, This photostat or picture, Plaintiff's Exhibit 30, for identification, when did you first see that or another copy of that photograph? A. Yesterday.

(Deposition of Nicholas L. Tominac)

XQ112. You did not see it before yesterday?

A. No, sir.

XQ113. What did you see at that time, a print or this photostat?

A. A regular photograph. [659]

Mr. Lyon: We object strenuously to the use of this indistinct photostatic copy of a print in the examination of this witness, particularly in view of the witness' testimony that as late as yesterday he saw a photographic print rather than a photostat thereof. The reason for the objection is that the photostat is so indistinct it is practically impossible to tell what is and what is not shown on the photostat.

Mr. Neave: The photograph itself will be produced tomorrow by the duly qualified witness, who will produce the photograph from the records of the company where it has been ever since it was taken in 1916.

Mr. Lewis Lyon: The point of our objection, your Honor, is that we did not have that material available for the cross examination of this witness, and that an indistinct copy was used, and that is all we have now, when a proper copy was in existence.

The Court: Is this the copy? This is more indistinct than the photostat that I have here.

Mr. Lewis Lyon: I have never seen the photograph. I don't recall seeing the photograph.

Mr. Neave: The photograph was produced when Mr. Lietz was called, and he was asked whether a photostat had been made.

The Court: Here is a photograph.

Mr. O'Hearn: This is the original. [660]

The Court: This is the original?

(Deposition of Nicholas L. Tominac)

Mr. Neave: And this is our stipulation on that on the next day:

"It is stipulated that the photograph produced by the witness may be placed in the custody of the notary to have a photograph taken of the photograph produced by the witness. When this has been done, the notary can then mark the photograph taken in place of that one produced by the witness, as Plaintiff's Exhibit 30-A, which is now offered in evidence in this case. The notary will then please return the photograph produced by the witness to Mr. Lietz at the Carnegie-Illinois Steel Company."

Mr. Lewis Lyon: That isn't the point of our objection.

The Court: The objection is overruled. Oh, pardon me. The point of your objection was?

Mr. Lewis Lyon: The point of our objection was that the witness testified from the photostat that was indistinct, when that was not the best evidence at that time.

The Court: The objection is overruled.

Mr. Lyon: XQ114 Now, Mr. Tominac, referring to this photostat, Plaintiff's Exhibit 30, for identification, is not this member right below the arrow leading from the letter D— A. Yes.

XQ115 A valve? [661]

A. That was a drain valve for this lead-in line for the whole system when it was not in operation.

XQ116. That member then that is indicated on that photograph which I will indicate by a lead line and arrow leading to the letter F— A. Correct.

XQ117 —is a drain valve, is it not?

A. Yes, sir.

XQ118. And that drain valve is outdoors?

A. Yes, sir.

(Deposition of Nicholas L. Tominac)

XQ119. In which of these buildings did you say the brine cooler coils were located?

A. The brine cooler coils, right in this building, in here (indicating).

XQ120. And is it not a fact that that 6-inch line D—

A. Yes, sir.

XQ121. Which is indicated on this photograph, Plaintiff's Exhibit 30, for identification, is laid on the catwalk, which I will indicate with a lead line and arrow and by the letter G, leads from the building to the building C and goes uphill in leading from building to the building C?

A. No. That was not uphill; that was downhill. There was a pitch on it.

XQ122. It went which way?

A. From in here, this way (indicating).

XQ123. This photograph is in error then or it is an [662] optical illusion in indicating that the catwalk was inclined from the building A to the building C?

A. That catwalk was made with a little pitch in it from this building out here, so the pipe was going down into the refrigeration with just a little bit of a pitch, a very little lower. The pipe line was right inside of that catwalk here (indicating).

XQ124. Then the pipe line D, the 6-inch pipe line, went down here? A. Just a little bit.

XQ125. In passing from the building A?

A. Yes, sir.

XQ126. To the building C, and continued down hill inside of the building C, did it?

A. It did, very little.

XQ127. But it was inclined downwardly?

A. It was inclined downwardly, yes.

(Deposition of Nicholas L. Tominac)

XQ128. That pipe—

A. Wait a minute, just a minute. It was inclined in here. When it come inside the building it was straight, right inside the building.

XQ129. Did you ever put a level on it?

A. No, I did not.

XQ130. Either inside or outside of the building?

A. No, sir. [663]

XQ131. Now, this valve that I have marked with the letter F and this 6-inch line which is laid on the catwalk G were all outside of any building, were they not?

A. That catwalk that you have photographed in here, yes.

XQ132. And the valve F was outside of a building?

A. Yes, sir. Inside, in here (indicating). There was a valve inside, in here, in the hallway before it goes to the compartment. That was your main valve to open up your water line in here. It was a regular hallway where the walkway was before you entered into the compartment.

XQ133. And that valve was inside the building just beyond the end of the catwalk G? A. Right.

X134. When you opened this drain valve—

A. The drain valve inside was ahead of the other valve, right in here (indicating). There was a 6-inch valve and a 2-inch valve connected into the 6-inch line to let that water out, to drain the water out of there, the water that was in the compartments.

XQ135. I think if you will just wait until I ask a question— A. I will.

XQ136. —and not volunteer statements, that both the Notary and I will be able to get along a lot better.

A. All right. [664]

(Deposition of Nicholas L. Tominac)

XQ137. Just wait until I ask you a question before you start to make a statement. A. All right.

XQ138. You operated this drain valve F on the outside of the building for the purpose of draining this 6-inch line so water would not freeze in that line, didn't you? A. When the building was not in operation.

XQ139. What do you mean, when the building was not in operation?

A. We did not operate during the winter months.

XQ140. And the purpose of that drain valve F was to drain the lines which would otherwise freeze—

A. This line in here (indicating).

XQ141. Just a minute,—during the winter months, is not that true? A. Correct.

XQ142. Now, you say you did not operate this system in the winter months, is that correct?

A. Yes, sir.

XQ142½. And the reason you did not operate the building in the winter months, or in any of the winter months— A. We did in some.

XQ143. Just a minute, please.

Let me have that question.

—was because the air was cold enough, is not that true? [665] A. Correct. You are right.

XQ144. And that air temperature might be anything from 35, 36, 37, or 38 degrees, is not that so?

A. About 35 degrees. It would be 35 degrees.

XQ145. And that is the condition that you always sought to establish when you did operate this system, is it not?

A. We established a little better when we operated than we did in the wintertime. We generally established around 25 to 28 degrees Fahrenheit.

(Deposition of Nicholas L. Tominac)

XQ146. Have you any records of the making of any readings of that temperature? A. Any records?

XQ147. Yes.

A. I have not got no records but I was taking readings once in a while just to prove to myself everything was going along all right, but we had a man in the office, a man to take the readings of all the temperatures of the system, the temperatures of the inlet line air and the outlet line air.

XQ148. And can you point out where those readings were taken?

A. The inlet air temperature was taken down by the air going into the compartment by shutters in the tunnel, while the air was going into the compartment, the inlet air, and the outlet temperature was taken on the top floor.

XQ149. Where on the top floor? [666]

A. Right in each individual compartment.

XQ150. Where in each individual compartment?

A. Right where that come in. There was a door to each compartment.

XQ151. You mean a door leading into each compartment? A. Yes.

XQ152. And that is where the temperature was taken?

A. Yes, sir.

XQ153. Was the temperature taken at any other place?

A. Well, we would take it once in awhile down there at the first floor,—the second floor, but most of the time the outlet air temperature was taken right on the top, right above the coils.

XQ154. Taken above the coils?

(Deposition of Nicholas L. Tominac)

A. Above the coils because your outlet was above the coils.

XQ155. How far above the coils?

A. About six feet above the coils.

XQ156. Above the coils? A. Above the coils.

XQ157. What was the size of these coils?

A. I don't recollect but I guess it was either a 2-inch or a 3-inch line.

XQ158. And how many of these coils were there in each compartment? [667]

A. Well, there was plenty. I could not say just exactly how many coils was in there.

XQ159. You have no idea?

A. No, I have not got no idea.

XQ160. How close were the coils placed together?

A. The coils were placed together about 6 inches apart.

XQ161. And how big was the room, or each compartment?

A. Do you want me to give a rough guess, because I never measured it. I would say about 12 by 36.

XQ162. And how high was each compartment?

A. About 12 by 12 by 36. That is just what I could think of it.

XQ163. And how much of the inside of this 12 by 12 compartment was occupied by the coils?

A. Everything except the walk on each side. One walk on the north side and one walk on the other side.

XQ164. And how wide were those walks?

A. Those walks was about, well, we will say 2 foot.

XQ165. How did you gain access to those walks?

A. Sir?

(Deposition of Nicholas L. Tominac)

XQ166. How did you get to those walks?

A. Each had a door.

XQ167. Doors where?

A. Doors to each compartment. From the main hallway there was a door to each compartment. Each compartment had a [668] separate door.

XQ168. This water which you say passed through this 6-inch line across the catwalk had been previously used for cooling the ammonia in the condenser, had it?

A. Correct.

XQ169. And it was therefore warmed by the operation of passing over the condenser, was it not?

A. Correct.

XQ170. Can you tell me any time or any date that you personally observed the temperature of the air leaving any one of the compartments which you say you defrosted?

A. Well, I have never taken the temperature of the compartments I defrosted.

XQ171. Can you tell me any time or any day during the time that you were employed when you took the temperature of the air leading from any of the compartments that you were not defrosting? A. Yes, sir.

XQ172. When?

A. Well, I might say once a week.

XQ173. What day was it?

A. I could not tell you that. By God, I would be a magician if I could tell that.

XQ174. What year was it?

A. Well, we will say '07, '08 and '09. [669]

XQ175. And was it your duty to take those temperatures? A. No, sir.

(Deposition of Nicholas L. Tominac)

XQ176. Can you tell me any day what the reading of the temperature was by the discharge of the air?

A. You mean the air that goes into the blast furnaces?

XQ177. The air that goes into the blast furnaces?

A. Between 25 and 28.

XQ178. That is the thermometer reading you are talking about as between 25 and 28 degrees?

A. Correct. Fahrenheit.

XQ179. Well, which did it read?

A. Well, sometimes 25, sometimes 26, sometimes 28. It all depends.

XQ180. What I am after, Mr. Tominac, is for you to give me a specific reading at any one time.

A. I don't get you right.

XQ181. Can you tell me any time what the specific temperature was in degrees of that discharge air? Not that it was so and so, but what was it?

A. It was 26 sometimes and sometimes it was 28.

XQ182. When was it 26?

A. Well, some days. It all depends how the operation—how the brine was cooled off in the cooling of the system.

XQ183. Do you remember any time you can say the thermometer read 26 degrees? [670]

A. That was when the coils were perfectly clear.

XQ184. Tell me when that was.

A. Right the day after defrosting.

XQ185. Can you remember any particular occasion that the thermometer read 26 degrees? I don't mean in generalities; I mean a specific date or time.

A. Well, it generally takes it to around about 2 o'clock in the afternoon, about Monday or Tuesday or any day. I could not exactly recollect which day.

(Deposition of Nicholas L. Tominac)

XQ186. Where was this thermometer placed?

A. Well, I take it along with me from the office.

XQ187. Just describe what you did with the thermometer?

A. It was a swinging thermometer, what you call a hygrometer, the one-half a wet bulb and the other half was dry and I would swing it around and then take the reading.

XQ188. Swing it around in what?

A. The atmosphere right above the coils.

XQ189. And you got two temperatures, didn't you?

A. Yes, sir.

XQ190. Can you tell me any time what the two temperatures were?

A. I don't remember that, but I remember on the dry one what it was.

XQ191. You have no idea of what the corresponding wet bulb temperature was at the same time? [671]

A. No, sir.

XQ192. And you cannot remember a specific occasion what the exact reading of the dry bulb was, can you?

A. I could tell that.

XQ193. You could tell that? A. Yes.

XQ194. Exactly what the reading was?

A. Yes.

XQ195. What was it? A. 26 and 28.

XQ196. When?

A. When I was taking it. One o'clock in the afternoon or 2 o'clock in the afternoon, whenever I took it. Once a week.

XQ197. You took it once a week? A. Yes.

(Deposition of Nicholas L. Tominac)

XQ198. But you cannot remember any month or any specific year?

A. Well, at that time I was employed over there.

XQ199. But it was not your duty to take those temperatures? A. No, sir.

XQ200. It was some one else's duty?

A. Yes, sir.

XQ201. Did anybody else take them?

A. Yes, sir. [672]

XQ202. Did they make a record of them?

A. Absolutely.

XQ203. Do you know what that record was?

A. I could not tell you.

XQ204. Have you made an effort to locate that record? A. No, sir.

XQ205. Do you know whether any effort has been made to locate that record?

A. I think there has been.

Mr. Lyon: XQ206. Did it make any difference in the operation of this plant in any of the readings that you say you took as to whether or not it was raining or dry, of the temperature outdoors, and by "readings" I mean the reading of the discharge air from this cooling?

A. It was a little different whenever it was raining outside than when it was dry, when it was perfect dry.

XQ207. Did you ever find while it was perfectly dry what the temperature was?

A. It was the lowest then.

XQ208. What was the lowest? A. 26.

XQ209. What do you mean by "perfect dry"?

A. It was dry weather outside, no humidity.

(Deposition of Nicholas L. Tominac)

XQ210. Did you make at any time any measurements of the relative humidity outdoors? [673]

A. No, I did not.

XQ211. What was the temperature when it was raining outdoors? A. Well, it was always higher.

XQ212. How much higher?

A. Around 28 degrees.

XQ213. It never got over 28 degrees?

A. I could not tell that. It did sometimes go up to 30, but that was very seldom.

XQ214. Did it ever go above 30?

A. Whenever I did take it I never saw that it was over 30. It might, but when I was taking it it was never over 30.

XQ215. Now, this drainpipe that you say was over the coils, you say it was horizontal? A. Yes, sir.

XQ216. That is, perfectly flat? A. Yes, sir.

XQ217. This drain valve then was right in the 6-inch pipe, right beyond or toward the coils from this 6-inch inlet valve and inside the building, is that correct?

A. Yes, sir.

XQ218. And that drain valve was in a horizontal pipe? A. Yes, sir.

XQ219. You say that your operation was to turn off this 6-inch valve? [674] A. Correct.

XQ220. And then to open the drain valve?

A. Yes, sir.

XQ221. Then isn't it a fact that you opened the inlet shutter at the bottom of each of these tunnels?

A. That was true, yes, sir.

XQ222. I mean that was your next operation?

A. Yes, sir.

(Deposition of Nicholas L. Tominac)

XQ223. And how long did you allow the air to blow into this compartment before you turned on the brine?

A. About half an hour.

XQ224. And how long after you turned on the brine was it before you opened the discharge shutters at the top of this air tunnel?

A. Just as soon as I seen that frosting started to accumulate on the pipes.

XQ225. How long was that?

A. It takes another half an hour.

XQ226. Then this entire system after you state that you opened this drain valve was put out of operation for approximately an hour for the purpose of drying out the water in the spray pipes, wasn't it?

A. Half an hour for drying out and half an hour after—I mean the brine started circulating. Until they started frosting, really. [675]

XQ227. During this hour of nonoperation and at the time you were drying out the header pipes with air, did you ever take the temperature inside any one of these compartments? A. No, sir.

XQ228. Do you know how much above-freezing the temperature was during that operation?

A. Well, it was cold enough to wear a coat.

XQ229. Isn't it a fact that you were blowing air directly into this compartment from the outside during that operation? A. Correct.

XQ230. And that that air might be, in the summer days when you state these operations occurred, as high as 80, 85 or 90 degrees?

A. Yes, sir, but the pipes was empty.

(Deposition of Nicholas L. Tominac)

XQ231. And the pipes were empty?

A. Correct.

XQ232. That is, there was nothing in the pipes to cool the air at that time?

A. Correct, but your brine, it was pumped out of the compartment, it was pumped out in a tank upon the roof lined with cork to keep the brine cold. The brine went up to a temperature of about 35 degrees and it stayed there during the operation and did not have much chance to cool off.

XQ233. This brine that you pumped out of these coils then was about 35 degree brine? [676]

A. Correct.

XQ234. And that was the brine which was used for the purpose of cooling air, wasn't it? A. Correct.

XQ235. And the purpose of pumping that brine up to the storage tank on the roof was to keep the brine from raising in temperature, wasn't it?

A. Absolutely, while you were defrosting.

XQ236. You had observed the temperature of this brine that you pumped out immediately upon closing the inlet and outlet for the air, is that correct?

A. Yes.

Mr. Lyon: That is all.

Redirect Examination

By Mr. Neave:

RDQ237. Mr. Tominac, during the defrosting operation of any particular compartment, was air blown through the compartment that was being defrosted?

A. No, sir.

(Deposition of Nicholas L. Tominac)

RDQ238. During the examination by Mr. Lyon, I understood Mr. Lyon to ask you a question in which he said that the drain pipe was over the coils. Was there any drain pipe over the coils or was there a spray pipe over the coils?

A. There was a spray pipe over the coils but that was lower than the original 6-inch line. [677]

RDQ239. That is, the spray pipe nozzle was lower than the supply line of the water? A. Correct.

RDQ240. After the defrosting operation had taken place and you shut off the water valve, was there any other valve that you opened or closed?

A. Yes. I closed the main valve right in that hallway and opened the drain.

RDQ241. That was the drain valve?

A. That was the drain valve to drain the 6-inch line inside the compartment.

RDQ242. Inside the compartment itself?

A. Yes, sir, and the sprays was lower than the 6-inch line. They drain themselves right through those holes while they were sprinkling.

RDQ243. And that was the drain valve F that you referred to on Exhibit 30?

A. That was the valve inside the building, not outside.

RDQ244. It was controlled from inside the building?

A. Correct.

RDQ245. Have you ever had any trouble with water pipes freezing inside of the refrigeration building?

A. To my recollection, no, sir, because the pipe was covered with this cork and black pitch. [678]

Mr. Neave: Now, the next deposition I will not read, your Honor, but I will summarize and then ask that the direct examination be copied into the record. It is the deposition of the witness Albert Gaide. He worked at the South Works of the Illinois Steel Company from 1907 to 1911, and he erected the refrigeration machinery and was assistant supervisor of the dry blast plant a part of the time, and a part of his duties were to see that the temperature and other readings were taken. Mr. Gaide has produced thirty-nine temperature charts forming Exhibit 32. These temperature charts he testified were the original daily record sheets from which the data had been transferred to other sheets by the people who had taken the temperature readings, and he kept these original sheets in a trunk in his own home. If your Honor will turn, say, to the first sheet—

Mr. Lewis Lyon: Your Honor, pardon me just a minute, Mr. Neave, but I think that is a very bad statement of the evidence. I think that this witness testified that as to these particular records he took them out of the waste-paper basket, that they had been thrown away, and it was never established at any time that they were a part of the records of the company; at least, some of them, to my recollection.

The Court: Let us see what the record says. That is the best way to settle it.

Mr. Lewis Lyon: I think that is correct. [679]

Mr. Neave: On page 47—

Mr. Lewis Lyon: On page 47—

Mr. Neave: Let me read it, if you will, it being my deposition. On page 46, at the bottom of the page, there is the question:

“Q37. That was as to the temperature of the air entering the compartments?

“A. Yes, sir.

“Q38. What about the temperature of the air leaving the top of the compartments?

“A. Well, that was most generally below 30 degrees, around 20 to 36, and in the wintertime much colder. That is another seasonal condition that changed that considerable.

“Q39. Have you at my request made a search to see if you could find any records of these temperature conditions?

“A. I have.

“Q40. Have you found any?

“A. I have.

“Q41. Would you produce them, please?

“A. (Witness produces documents.)

“Q42. Now, where have these records been, Mr. Gaide?

“A. These have been in the engine room office of Mr. Leinert. [680]

“Q43. Until what time?

“A. Until around 1910.

“Q44. And then what happened to them?

“A. Well, these I took out around that time. I got them out of the waste-basket, you might say, these here.

“Q45. Where have they been since you got them out of the waste-basket?

“A. I have had them home in a trunk in the attic.”

Then I will refer to his redirect examination:

“RDQ192. As I understood your testimony on redirect,”—that should be “direct” instead of “redirect”—

“Mr. Gaide, the temperature man would make records on sheets of paper such as are shown in Plaintiff’s Exhibit 32, and then that data would be transferred to what you call daily records, is that correct?”

“A. That is it.

“RDQ193. And when you told Mr. Lyon that you knew of no instance where the daily records were thrown away, you referred to the sheets to which this data, sheets such as Plaintiff’s Exhibit 32, were transferred, is that correct?”

“A. Yes.”

Then there is another point.

The Court: Let’s wait until we get to the redirect. Let’s [681] have all the direct first. That is all there is on direct.

Mr. Neave: Yes. I think there is something in the cross that I am thinking of on the same subject, but that will be brought out, I think.

The Court: Very well.

Mr. Neave: I might also interject that there is a stipulation that if the man in charge of the engineering records of the company were called he would testify that the records had been destroyed, so that they would be the only records available to us.

Mr. Lewis Lyon: That last was not a part of the stipulation.

Mr. Neave: No, that was not the stipulation as I understand—

Mr. Lewis Lyon: Pardon me. You just hung it on to the stipulation.

Mr. Neave: I am sorry. I did not mean to give the impression that it was a part of the stipulation.

The Court: Have you finished with his direct?

Mr. Neave: Yes, except to call your Honor's attention to the fact that in his direct examination he described what these various columns meant in these various sheets, and that the fourth column from the left was the temperature of the air at the top of the coil, as indicated at the top of the column.

The Court: Now, just a minute. Oh, the fourth column, [682] entitled "Top of Coil"?

Mr. Neave: That is right, sir.

The Court: That was the temperature?

Mr. Neave: Yes.

The Court: What is this psychrometer?

Mr. Neave: I believe the psychrometer is one of these things that you swing around.

The Court: A whirling thermometer?

Mr. Neave: Yes, it is a wet and dry bulb thermometer.

The Court: Now, does that indicate whether it is the top of the coil, or what?

Mr. Neave: On the psychrometer?

The Court: Yes.

Mr. Neave: No, that isn't indicated, but I believe in his testimony he does refer to it, although I can't remember now just where he said that was taken. I think that these readings were on an electric machine, but I am not sure. I would have to look that up, if you want it.

The Court: A lot of these do not seem to be identified by date. Oh, ending 6 A. M., June 13th, I see.

Mr. Neave: Yes. They were either for a night shift or a day shift that the particular man took the temperatures, and that was when he went out, and it was for the period as you will see. You see down in the first column to the left are hours, and the readings in there opposite the hours are [683] indicated on the chart.

The Court: Yes.

Mr. Lewis Lyon: There is no testimony of any person who ever took these that they are true records of the company. The only testimony is that it is something that this man picked out of the waste-basket.

The Court: Did you have some cross examination?

Mr. Lewis Lyon: Yes.

The Court: What do you want done about that?

Mr. Lewis Lyon: I will ask that the cross examination be included in the record so that the whole record would be before the court.

The Court: Do you want to draw any of it to my attention now?

Mr. Lewis Lyon: No, I don't think there is any of it now, your Honor, that it is necessary to have brought to your attention, as I recall.

Mr. Neave: I would like to have the redirect examination, which is on pages 80 and 81, copied into the record.

The Court: So ordered.

Mr. Neave: And there is a statement on page 82 which I made, which I would like to have copied into the record, which is in regard to the McCarthy letter that was produced. [684]

ALBERT GAIDE,

called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Neave:

Q1. What is your full name?

A. Albert Gaide.

Q2. Albert Gaide? A. Albert Gaide.

Q3. And your residence?

A. 2236 South Winchester Street.

Q4. Milwaukee? A. Milwaukee.

Q5. Where do you work at the present time?

A. Nordberg Manufacturing Company.

Q6. Is that in Milwaukee? A. In Milwaukee.

Q7. And what is your trade?

A. Pipe fitting line. It is maintenance work I am doing there.

Q8. Were you ever employed by the Illinois Steel Company? A. Yes.

Q9. When was that?

A. That was between 1907 and after 1910. Between [685] 1910 and 1911.

Q10. 1907? A. 1910. Between 1907 to 1911.

Q11. What work were you doing for the Illinois Steel Company?

A. I was first assistant to Leinert, Chief Engineer.

Q12. And actually what work were you supervising in the plant?

A. Well, I had charge of the plant while Leinert was gone.

Q13. What plant was that?

A. Dry blast plant.

(Deposition of Albert Gaide)

Q14. How did you happen to work for the Illinois Steel Company?

A. I was sent down there from the Vilter Manufacturing Company, Milwaukee, Wisconsin.

Q15. Why were you sent down there by them?

A. I worked on the erection of the refrigerating machinery.

Q16. Did the Vilter Company supply some of the refrigerating machinery?

A. They supplied the compressors, the engines, the ammonia condensers and the brine coolers.

Q17. Did any frost accumulate on the brine coolers?

A. In the refrigerating department while they were [686] dehumidifying the air there the frost accumulated.

Q18. By "brine coolers" you had reference, did you, to the cooling with the ammonia gas?

A. The cooling of the brine by the ammonia gas.

Q19. Well, let's get this straight. As I understand it, you had an ammonia plant and then you had a condenser unit?

A. A condenser unit.

Q20. And then you had a refrigerator building?

A. We had 80 stacks of double-pipe brine coolers where the brine was cooled and it was pumped into these seven compartments where the air was dehumidified.

Q21. And these seven compartments you are referring to were in which building?

A. They were in a separate building by themselves.

Q22. Did you call that the refrigeration building?

A. That is the refrigeration building.

Q23. You state that frost accumulated on the brine coils in the refrigerator building?

A. Yes, sir.

(Deposition of Albert Gaide)

Q24. How did you get that frost off the coils?

A. We sprayed water over the top. Shut off whatever compartment we wanted to thaw off and sprayed water over the top.

Q25. Over the top of the coils?

A. Over the top of the coils. [687]

Q25½. Did that remove the frosting from the coils?

A. Oh yes. Could I mention something in regard to where I mentioned a separate building?

Q26. Yes. Go ahead.

A. They had separate departments like the compressor room was on the ground floor and over the compressor room we had your ammonia condensers, and then to the one side was the brine coolers and next to that your refrigerating coils. Then there was another separate room for the brine pumps. The buildings were scattered all over.

Q27. Mr. Gaide, what were your duties as assistant supervisor of the dry blast plant?

A. Well, I saw that the readings were taken.

Q28. Which readings are you referring to?

A. The temperature readings and the humidity readings. For instance, we had the brine inlet, the brine outlet, the water temperature inlet, the condenser and the water temperature outlet, the atmosphere temperature outside, the air temperature entering the refrigerating rooms—compartments, rather. And we took humidity readings, dry and wet-bulb readings of the air entering the compartments and the air temperature leaving the compartments, and the humidity readings of that air.

Q29. Whose business was it to take these readings?

A. We had a regular temperature man. [688]

(Deposition of Albert Gaide)

Q30. A temperature man?

A. We called him a temperature man.

Q31. And what did they do with these temperatures after they took them?

A. That was entered on a big sheet, a daily report sheet after they scribbled it off on scratch paper, what I call it, lined paper.

Q32. And then they transferred these figures from the scratch paper as you call it—

A. To daily report sheets.

Q33. And where did those daily report sheets go?

A. Well, off the original they made several blueprint copies that were scattered around through different departments throughout the plant. I don't know just who got them.

Q34. Did your office get any? A. Yes.

Q35. Were you familiar with these temperature readings? A. Well, pretty much so. I should be.

Q36. Do you recollect what the temperatures were in the refrigeration building in the compartments that were in operation?

Mr. Lyon: That is objected to as calling for secondary evidence and not the best evidence, and incompetent, irrelevant and immaterial, this witness having not testified that he ever took any readings himself. [689]

Mr. Neave: You can answer the question.

Mr. Lyon: And hearsay.

The Witness: I can answer your question?

Mr. Neave: Yes. You can answer my question.

The Witness: You asked about the temperatures?

Mr. Neave: Yes. Do you want the question read?

The Witness: Yes.

(Deposition of Albert Gaide)

(The question was read, as follows: "Do you recollect what the temperatures were in the refrigeration building in the compartments that were in operation?")

A. Well, that depended upon the weather conditions as far as entering the bottom, seasonal conditions, you might say.

Q37. That was as to the temperature of the air entering the compartments? A. Yes, sir.

Q38. What about the temperature of the air leaving the top of the compartments?

A. Well, that was most generally below 30 degrees, around 20 to 36, and in the wintertime much colder. That is another seasonal condition that changed that considerable.

Q39. Have you at my request made a search to see if you could find any records of these temperature conditions? A. I have. [690]

Q40. Have you found any? A. I have.

Q41. Would you produce them, please?

A. (Witness produces documents.)

Q42. Now, where have these records been, Mr. Gaide?

A. These have been in the engine room office of Mr. Leinert.

Q43. Until what time? A. Until around 1910.

Q44. And then what happened to them?

A. Well, these I took out around that time. I got them out of the waste-basket, you might say, these here.

Q45. Where have they been since you got them out of the waste-basket?

A. I have had them home in a trunk in the attic.

(Deposition of Albert Gaide)

Mr. Neave: In order to be able to refer to these records, I ask that the bunch of records stapled together, consisting of 39 pages, which the Notary has stamped with page numbers in the right-hand upper corner from 1 to 39, I ask that the entire group of 39 pages be marked as Plaintiff's Exhibit 32, for identification.

(Said records were marked for identification.)

Q46. Now, referring to Plaintiff's Exhibit 32, page 1, I see that this page 1 is headed "Illinois Steel Company South Works. Dry Blast Plant Engine Room Report," and that [691] there is a date saying "Ending 6 a. m. May 15, 1910." Will you state whether or not this is the type of record that was handed in by the temperature men that were under your supervision while you were with the Illinois Steel Company at the dry blast plant?

A. On the night shift, the night man—

Q47. Will you answer the question, first, please?

A. Yes.

Q48. What were you going to say?

A. What I was going to say is that the night engineer, toward the end, he was taking care of the temperature readings. Now, whether the temperature man on the night shift was on at this time or not I don't know.

Q49. Who was it that took care of the temperature readings at night?

A. Well, there for a while we had temperature men there.

Q50. And then after that?

A. And then after that, so Nick tells me, who was there—

Q51. I only want what you yourself know and recollect. First of all, tell me, were you with the dry blast

(Deposition of Albert Gaide)

plant as assistant superintendent in May, June, July and September of 1910? A. Yes.

Q52. You were? [692] A. Yes.

Q53. Now, referring again to Plaintiff's Exhibit 32, page 1, I see at the top of the page there are several columns. First of all, we have "Weather Conditions," and under that there are no entries, are there?

A. No.

Q54. The next column is headed "Temperature," which covers two columns. Under "Temperature" in one column is "Atmosphere" and in the second column "Top of Coil." Now, what do the entries in the column marked "Temperature Atmosphere" refer to?

A. That is the outside air.

Mr. Lyon: Just a minute. That is objected to on the ground the witness has not been qualified to answer the question.

Mr. Neave: Go ahead and answer.

A. That was the outside temperature.

Q55. Of the air? A. Of the air.

Q56. And in the second column is the heading "Top of Coil." What do the entries under that column mean?

A. That was the temperature of the air about to leave the dry blast plant refrigerating coils.

Q57. Where was that temperature taken?

A. On top of the coils. [693]

Q58. The fourth column has a heading "Psychrometer," a sub-head "Inlet," and a column under that sub-head "Dry." What do the entries in that "Inlet Dry" column refer to?

A. That is the temperature of the air entering the refrigerating compartments at the bottom.

(Deposition of Albert Gaide)

Q59. The fifth column is "Inlet Wet." What does that mean?

A. That is the temperature of the air leaving—

Q60. "Inlet Wet"?

A. Oh, that is the temperature of the wet bulb thermometer of the psychrometer.

Q61. At what point?

A. That was taken at the bottom of the refrigerating coils.

Q62. The sixth column is headed "Outlet Dry." What are the figures entered in this column?

A. That is the temperature of the air about to leave the refrigerating compartments.

Q63. That is over the coils? A. Over the coils.

Q64. The seventh column is entitled "Outlet Wet." What do the entries in this column mean?

A. That is the temperature of your wet bulb thermometer when you swing your psychrometer.

Q65. At what point?

A. At the top of your refrigerating coils. [694]

Q66. The last two columns have a common heading, "Moisture Grains Per Cubic Foot" with a subdivision, the next to the last column being "Inlet." What do the figures entered in this column mean?

A. Grains of moisture per cubic foot entering the refrigerating coils.

Q67. That would be at the bottom?

A. At the bottom, entering the refrigerating coils.

Q68. And the last column is headed "Outlet" under "Moisture Grains Per Cubic Foot." What do entries under this column mean?

(Deposition of Albert Gaide)

A. That is the grains per cubic foot leaving the refrigerating coils—compartment, rather.

Q69. At the top of the compartment?

A. At the top, yes.

Q70. Now, referring to pages 2, 3, 4, 5, 6, 7 and 8 of Plaintiff's Exhibit 32, they all have the same headings, do they not? A. You mean here, this heading?

Q71. Yes. A. Yes.

Q72. I call your attention, however, to pages 2 through 8, which have certain entries under "Weather Conditions." On page 2 there is the word "Brine" in that column and figures under that word. To what does that refer? [695]

A. One is the brine inlet and the other is the brine outlet.

Q73. Temperatures? A. Temperatures.

Q74. That is the temperature?

A. The temperature of brine going into the refrigerating coils and the temperature leaving the coils.

Q75. Is that true also of page 3? A. It is.

Q76. Page 4? A. It is.

Q77. Page 5? A. It is.

Q78. Page 6? A. It is.

Q79. Page 7? A. It is.

Q80. And page 8? A. It is.

Q81. Now, turning to page 9 of Plaintiff's Exhibit 32, which is on a yellow sheet of paper, can you tell me what these yellow sheets of paper which consist of pages 9 through 39 consist of?

A. Well, they consist of the air temperatures outside, entering the compartments. [696]

(Deposition of Albert Gaide)

Q82. Are these reports that were made by the temperature man?

A. Those are reports made by the temperature man.

Q83. I see. I note that on page 9 there are a number of columns. The first one is marked "Time." The second is "Atmosphere In," and "Top." To what does that refer?

A. The "Atmosphere In" is the outside atmosphere temperature.

Q84. And the "Top"?

A. Is as it leaves the top or refrigerator coils—compartment, rather.

Q85. That is the temperature?

A. That is the temperature.

Q86. The column "Inlet Dry" and "Wet," what does that mean?

A. That is the temperature shown by psychrometer readings taken at the bottom of your refrigerator,—compartment.

Q87. For both dry and wet bulbs?

A. For both dry and wet bulbs.

Q88. And the column "Outlet Dry" and "Wet" refer to what?

A. Psychrometer readings of the air leaving the top of the compartments, refrigerating compartments. That is the temperature of the air.

Q89. Then the next two columns are entitled "Moisture Inlet" and "Outlet." [697]

A. That is the grains of moisture per cubic foot entering the bottom of the refrigerating coils, and the outlet is the grains leaving the top of the coils.

(Deposition of Albert Gaide)

Q90. The next two columns are entitled "Brine Feed Ret." What do those entries in those columns signify?

A. The brine feed is the temperature of the brine entering the top of the refrigerating coils.

Q91. And what is the column entitled "Ret."?

A. That is returned. That is the temperature leaving the bottom of the coils.

Q92. Would you look through pages 10 to 39 and see whether the headings are the same on those pages as you have described for page 9? I am talking about the headings.

A. Just the headings, you mean?

Q93. Just the headings?

A. There seems to be a little difference here on 33.

Q94. Page 33. In what column is that?

A. Right here (indicating).

Q95. The last two columns. What is the heading of that? Can you read it?

A. I don't know. It looks like "Top" to me.

Q96. How about "Dope"?

A. It might be dope but it looks like top to me. I don't know.

Q97. Do you know what the significance of it is? [698]

A. No. I have not got the least idea what that would be. This would be the grains of moisture.

Mr. Neave: Referring to the column under what looks like "Dope Dry Blast," the witness is pointing to that column.

Q98. Now, what were you saying, Mr. Gaide?

A. That looks like the grains of moisture in the air per cubic foot leaving the top of the,—what do you call

(Deposition of Albert Gaide)

it, the refrigerating coils. That is what it would be if it is checked up, Dry Blast, is it? And 1.83.

Mr. Lyon: That indicates, does it not, that there is more leaving than is entering?

The Witness: I don't know. I am not sure about this.

Mr. Neave: Q99. You are not sure what the meaning of that column is?

A. No, I don't know what it means, but I could figure out from the decimal point that it pertains to grains of moisture and cubic feet of air.

Mr. Lyon: There is more leaving than entering on that sheet?

The Witness: I don't know.

Mr. Lyon: You notice it says—

Mr. Neave: Why don't you reserve that until you cross-examine?

Mr. Lyon: I was trying to get this straight. [699]

It says "1.83 Dry Blast" and then it says "Top 30." Does that indicate that there is more moisture entering the top than entering the bottom?

The Witness: Oh no.

Mr. Neave: Q100. Would that be grains or temperature? A. That would be grains leaving the top.

Q101. Under dry blast?

A. Why sure, under dry blast.

Mr. Lyon: Under "Top" what would be the grains leaving?

The Witness: That is probably a temperature they got somewhere. That is 30 degrees temperature they got somewhere. There is some adjusting done in there in their reading somewhere.

(Deposition of Albert Gaide)

Mr. Lyon: You don't know what that is?

The Witness: I don't know what it is. I know the one pertains to grains of moisture and the other to temperature because if it was grains of moisture there would be a decimal point between. You would never get 30 in this section.

Mr. Neave: Q102. Very well. And on page 34 you have the same two last columns as you had on page 33, "Dry Blast" and "Top."

A. Well, that pertains, the top, that 27.5 pertains to the same temperature, that 31 on the outlet. There was some adjustment made in their reading somewhere.

Q103. That was the temperature at the top? [700]

A. That was the temperature at the top. And here at the outlet they have got 31 temperature, you see, and then the moisture reading here they had,—that is the outlet moisture reading, that I know.

Q104. The last two columns on pages 35, 36, 37, 38 and 39 have the same headings?

A. They are the same. Now, if you don't mind, I can explain a little on that.

Q105. I wish you would.

A. We have had an electrical instrument there, a temperature instrument, where you can take a good many of your readings from the engine room floor, like, for instance, the air inlet going in at the bottom between the fans and your compartments, and the air leaving the top, and the brine inlet and the brine outlet, and the water inlet and the water outlet, which can be taken right from this instrument.

(Deposition of Albert Gaide)

Now, this fellow may have went around and taken his readings and then checked them over on the instrument. There was an instrument there where they could take care of practically all the readings with the exception of your dry and wet bulb readings. There they had to go to that point.

Q106. Will you state whether or not it was the regular practice of the temperature man to take the temperature readings of the air every day? A. Oh, yes. [701]

Q107. And these reports are the reports that were made pursuant to that practice? A. Yes,

Q108. Was it any part of your job to keep track of these temperature readings?

A. Well, these temperature readings, no, it was not up to me to keep track of them.

Q109. Did you have any knowledge of them?

A. Oh, yes. In fact, I used to take readings myself but I never entered them on a slip because that was not my duty.

Q110. But you had to consult these temperature readings in the operation of the plant?

A. Sure. I would check them over myself during the day, but these fellows had a regular hourly time, or two hours at a period, where they took their readings and they made their notes, but during any time I could check it, I could take a reading because I had the instrument right before me and check all the apparatus. We could swing from one compartment to another like the water inlet, water outlet, air inlet, air outlet.

Mr. Neave: All right, Mr. Lyon.

(Deposition of Albert Gaide)

Cross Examination

By Mr. Lyon:

XQ111. Mr. Gaide, you say you left the employ of the Illinois Steel Company in 1910 or 1911, is that correct? [702]

A. Somewhere in that neighborhood.

X112. Was that before or after this plant, this dry blast plant that you have testified concerning, was dismantled? A. That was before.

XQ113. You state that you were sent to the Illinois Steel Company by Vilter, I believe; is that correct?

A. Yes, sir.

XQ114. Who is Vilter?

A. They are ice-machine manufacturers.

XQ115. Located where? A. In Milwaukee.

XQ116. And had you been employed by that company before you went to the Illinois Steel Company?

A. Yes, sir.

XQ117. For how long?

A. I started in 1905.

XQ118. In what capacity?

A. I started out in the pipe shop.

XQ119. Was that the only capacity you worked for Vilter?

A. Then I went out on the road for Vilters, setting up machinery.

XQ120. How is that Vilter spelled?

A. V-i-l-t-e-r. We say Vilters on account that there used to be three brothers. [703]

XQ121. What kind of refrigerator machinery did Vilter handle?

A. For ice plants, breweries, packing houses.

(Deposition of Albert Gaide)

XQ122. What kind of refrigeration apparatus?

A. The ammonia type.

XQ123. That is the ammonia expansion type?

A. Ammonia expansion.

XQ124. You had no connection with the Illinois Steel Company prior to the time that Vilter sent you there to work for them, is that correct? A. Correct.

XQ125. Now, for this job for the Illinois Steel Company, you say Vilter supplied the compressor, the engine and the brine coolers, is that correct?

A. Yes, sir and ammonia condensers.

XQ126. And the ammonia condensers? A. Yes.

XQ127. You have testified that this cooling tower arrangement at the Illinois Steel Company was used out there for humidifying and dehumidifying the air. What do you understand those terms to mean?

A. Well, it just dehumidifies the air, is what I mean. They were dehumidifying it.

XQ128. What do you understand that term to mean?

A. Well, it is taking moisture out of a cubic foot of air space. [704]

XQ129. And is it not true that air, that all air has a dew point depending upon its relative humidity at which water will drop out of the air by reducing the temperature below that dew point? A. Yes.

XQ130. And that temperature may be very greatly above or below freezing, is not that true?

A. It can be; yes.

XQ131. Do you understand it was attempt of the Illinois Steel Company to remove all the moisture from the air? A. No, sir.

(Deposition of Albert Gaide)

XQ132. Was there any limit placed that you know of on the amount of moisture that could remain in the air for use in the blast furnaces?

A. Not that I know of.

XQ133. You do not know how much moisture could be removed from the air nor how little, or how much could remain in the air and have the air satisfactory for use in that condition?

A. I don't know just how much could be removed.

XQ134. Was it the practice of the Illinois Steel Company, while you were there, as you say, as assistant in charge of the operation of this dry blast plant to throw their records of these operations away daily?

A. Well, that I don't know either.

XQ135. Did they throw the operating records away?

A. Not the daily. [705]

XQ136. Did they throw any of the actual records away to your knowledge?

A. Well, these here, what I have showed here were throwed away. Probably they accumulated a month or two and then they throwed them away.

XQ137. Probably. Do you know of any instance where they actually threw the records away?

A. I have no special date, no, but these were throwed away when I got them.

XQ138. Do you know, Mr. Gaide, who it was that actually kept these records, that you have here produced as Plaintiff's Exhibit 32, for the company?

A. I don't know who kept them, but a fellow named Amman took the copies of them and put them on the daily sheets.

(Deposition of Albert Gaide)

XQ139. During any time while you were in the employ of the Illinois Steel Company, do you know of any instance where the records of the actual operations were discarded or thrown away?

A. That I don't know. That is the daily ones I am talking about.

XQ140. You testified on your direct examination concerning the manner of keeping these records, that Nick had told you something about them; is not that true?

A. That is.

XQ141. And who was Nick? [706]

A. Nick Tominac.

XQ142. That is, his correct name is Nicholas Tominac, is that right? A. That is it.

XQ143. When did he tell you about these records?

A. Oh, about five or ten minutes before we come in here.

XQ144. That is today? A. Today.

XQ145. At any other time? A. No, sir.

XQ146. And what did Mr. Tominac tell you about those records?

A. Well, he thought that the night engineer was taking the night records, that is, toward the end. I know when I first started there was record men, 12-hour shifts, and the records were taken by a regular temperature reader. Then he tells me now that he thought the night man was taking the night readings, but at the time I was there they were taking hourly readings by regular temperature men. That was all they had to do.

XQ147. Referring to this record, page 1 of Plaintiff's Exhibit 32, for identification, or rather referring to page

(Deposition of Albert Gaide)

2 thereof, will you tell me what this extended column of figures is on the right-hand margin of 0.99?

A. That pertains to grains of moisture per cubic foot [707] after it left the top of the coils.

XQ148. I understood you to tell me that was what was meant by the column under "Outlet," the last column inside the bracket?

A. There has some correction been made there which I don't know anything about, but this is their psychrometer reading, this 1.29 is the actual reading they had on top. Now, this here one I don't know what it is.

XQ149. You don't know anything about it?

A. No.

XQ150. This set of figures of 0.99 which appear on the right-hand margin of this page 2 of this exhibit, is that correct? A. Yes.

XQ151. And similarly you don't know what the extended margin set of figures on page 1 of this exhibit is?

A. No.

XQ152. And the same is true of this extended set of figures which are shown on the right-hand margin of all of the pages 3, 4, 5, 6, 7, and 8, of this exhibit, do you?

A. Well, now, wait a minute. I would like to make a correction there. I know what they are but how they arrived at that, I don't know. That is what I mean. It pertains to the grains of moisture leaving the outlet on top. It pertains to this same reading, what there is here. There [708] has same correction been made somewhere. It is the outlet reading. It is either this or that. It has some relation between the two but how they arrived at it, I don't know. I know it is grains of moisture but how

(Deposition of Albert Gaide)

they determined it I don't know. This (indicating) I know, but how they determined that (indicating), I don't know.

XQ153. The same follows through on page 9, the set of figures reading "1.65" in the last column of figures on that page, is not that true?

A. That is the grains of moisture leaving the top of the air coils.

XQ154. But you don't know how those were arrived at?

A. They are arrived at—you had your moisture readings. You have your humidity first and then you checked up, from your humidity you checked up your grains of moisture in that cubic foot of space. They had a regular table there which after you had swung your psychrometer, and you got your wet and dry bulb readings, then you determined from your chart the grains from the temperature high reading, and the difference in the two temperature readings.

You looked at your humidity and found that humidity. You had another table and you checked up on that the temperature of the air at whichever point you are taking your humidity from, and your humidity reading you checked over and got your grains of moisture per cubic foot of space in the [709] humidity readings, inlet and outlet, but why they made their alterations, that I don't know.

XQ155. My point is, on page 9 you don't know whether this set of figures 1.65, repeated four times for the four operations, were actual readings or whether those were corrected readings?

A. This here where there is not a correction on the side is an actual figure. You don't see that correction on this here.

(Deposition of Albert Gaide)

XQ156. Did you see the person make these entries here or make these readings?

A. No, I never seen him. I may have seen him but I don't recall.

XQ157. You note that on page 9 there is no heading above those 1.65, is not that true? A. Yes.

XQ158. Can you state definitely whether that is an actual or a corrected reading or a calculated determination of those figures 1.65?

A. I could not state actually unless you figured it out. It could be figured out if you had the tables.

XQ159. The same is true with respect to the extended figures on the right-hand column of figures on page 10, is it not, which figures are 0.99, 1.01 and 1.02?

A. Yes, sir. [710]

XQ160. And the same is also true with respect to the figures appearing on page 11 in the last column, which figures are uniform figures in that column, 1.03?

A. Yes.

XQ161. And as to this right-hand set of figures on all of these pages 12 and 13 to 32, inclusive, is not that true? A. Yes.

XQ162. Mr. Gaide, did you ever take the temperature of any of these compartments, the air temperature, either wet or dry bulb, after the brine had been withdrawn from the brine pipes or coils and before the water was turned on over the coils? A. No, sir.

XQ163. Did you ever take the temperature of the air in these compartments at the time the brine had been withdrawn from those pipes and both the inlet and outlet of air to those compartments had been closed, and before the water was turned on? A. No, sir.

(Deposition of Albert Gaide)

XQ164. Did you ever take the temperature of these compartments in which the coils were mounted at any time?

A. Once in a while, but not for the records.

XQ165. Do you know what the temperature of these compartments was at the time that the water was turned on after it had passed over the coils? [711]

The Witness: Can I get that question read?

(The question was read.)

A. No.

XQ166. And similarly I presume you do not know what the temperature of the compartments was after the water had been shut off and the inlet of the air had been opened to the compartments and the system allowed to stand with the air entering through the inlet for a period of approximately thirty minutes, is not that true?

A. No.

XQ167. You don't know what that temperature was either? A. No.

XQ168. You do know, however, that the object of the operation of shutting off the water and allowing the air to enter the compartment through the inlet was to blow out the water from the spray pipes and also off the coils, wasn't it.

A. I don't know. Not that I know of.

XQ169. What is that?

A. No, it was not for that purpose. Now, get this, I want to get this right.

XQ170. Isn't it a fact that this is what was done: The water was turned off, the inlet to that compartment

(Deposition of Albert Gaide)

was opened which allowed the air which was blown through a common duct to enter that compartment?

A. I don't think it was operated that way. [712]

XQ171. The air was not allowed to enter the compartment?

A. The air was shut off on top.

XQ172. Was that a solid closure?

A. There was some kind of a swing that had—I think there was two openings that went in from the top and went into a big duct, and from there over to the blast furnace.

XQ173. That is right.

A. And this brine was shut off first.

XQ174. That is right, and pumped out?

A. Pumped out. Then he shut off the air and put on the water at the same time.

XQ175. How long a period of time was allowed to elapse between the time that they took out the brine and they turned on the water?

A. Oh, that must have been thirty or forty-five minutes, somewhere in there. I am not just sure what it was.

XQ176. Where was this building located in which these cooling towers were positioned?

A. These cooling coils?

XQ177. Coils?

A. That was east of the brine cooler room.

XQ178. How far distant was it from the blast furnaces themselves?

A. That was quite a ways. I could not tell you that. The blowing engines were a couple of hundred feet away, I [713] imagine. There was a big space of some kind

(Deposition of Albert Gaide)

there. I have not the slightest idea, to tell the truth. From there it went to the blowing engine. That was quite a distance away.

XQ179. This engine shop, that you said was located adjacent to this refrigeration room, wasn't it?

A. Yes.

XQ180. Was it necessary to employ steam heat to heat that room? A. Oh, no.

XQ181. Did you have any type of heat in that room?

A. No.

XQ182. In fact, being located in a steelplant of that kind, there is enough heat around there so you don't need any heat?

A. That I don't know. That was not the reason. The water was always kept in circulation, or else drained. That was the reason they did not need it.

XQ183. Do you understand what the purpose was of taking the moisture out of the air?

A. Why, the way I understood it, was to cut down the consumption of coke, and they got a better grade of pig-iron out of it.

XQ184. You do know that this operation was discontinued shortly after you left the company, don't you?

A. Yes, sir.

XQ185. And you do know that they continued to make steel, don't you? [714] A. Yes, sir.

XQ186. You don't know whether they utilized any different method of taking the water out of the air after they took this down, what you call the dry blast plant, do you? A. No, I don't.

XQ187. You don't know whether they substituted some other method or not? A. No, I don't.

(Deposition of Albert Gaide)

XQ188. Have you been back to the Illinois Steel Company since you left there?

A. No, I have not. Oh, come to think of it, I worked about three or four weeks a few years after this plant was out.

XQ189. I see. And do you know whether they were using any other means of taking the moisture out of the air at that time? A. No, I do not.

XQ190. Where were you?

A. I was in the gas engine department for a week or two. I don't remember whether it was a week or two, but I know I was there a while.

XQ191. And as far as your observations went at that time, and your recollection at the present time, they were using no other dehumidifying operation?

A. No.

Mr. Lyon: That is all. [715]

Redirect Examination

By Mr. Neave:

RDQ192. As I understood your testimony on direct, Mr. Gaide, the temperature man would make records on sheets of paper such as are shown in Plaintiff's Exhibit 32, and then that data would be transferred to what you call daily records, is that correct? A. That is it.

RDQ193. And when you told Mr. Lyon that you knew of no instance where the daily records were thrown away, you referred to the sheets to which this data, sheets such as Plaintiff's Exhibit 32, were transferred, is that correct? A. Yes.

Mr. Lyon: That is objected to as leading, grossly so.

(Deposition of Albert Gaide)

Mr. Neave: RDQ194. How, if at all, did the operating data, such as temperature, moisture content and so forth, such as shown on Plaintiff's Exhibit 32, affect your operation of this plant so far as you personally was concerned?

A. Well, I got the humidity readings or grains of moisture that would be in the air, and that would vary, you know, and then I would have to operate the machines accordingly. I got my readings from these temperature men so I knew what to do with the machines. There were times I would run one machine, or two machines, or four machines. If all four were running and the moisture was going up, we would just speed [716] them up, and that is how we operated the machines, according to the readings that I got acquainted with through the temperature men.

RDQ195. Did you ever operate the plant in the wintertime? A. Oh, yes.

RDQ196. Was it operated continuously?

A. No.

RDQ197. Or intermittently?

A. Intermittently. There would be time, we would probably shut down a week, and then again we would operate them for days. In the wintertime it depends upon the shift of the wind there. You get a lake wind, and the lake is not frozen and it boosts your grains of moisture to around 3 per cubic foot, and we would start the machines; but when the temperature got down so it was around 5, 10 or maybe a little colder, and the wind happened to be from the north or northwest, and the atmosphere was pretty well down, why, we would shut the machines down. So the machines, they were run off and on all winter, but at times they would be shut down a

(Deposition of Albert Gaide)

little longer than other times. It all depended upon the conditions.

RDQ198. Were you ever in the refrigeration building? A. Oh, often.

RDQ199. Were you ever at the top of the building, toward the top of the coils? [717]

A. Often.

RDQ200. Do you know how the water was turned on for the defrosting process?

Mr. Lyon: Objected to as not redirect examination.

A. Well, they had a main water valve in the main and then a valve at each compartment, and a drain valve between the valve and the compartment valves.

Mr. Neave: RDQ201. Where was water valve in the main?

A. That was toward the brine cooler department, in the corner, off kind of a hallway.

RDQ202. A hallway in the refrigerating building?

A. Yes.

RDQ203. Did you ever know Alfred Mueller, M-u-e-l-l-e-r? A. Yes.

RDQ204. Did he work for the Illinois Steel Company in the dry blast plant when you were there?

A. Oh, yes.

RDQ205. What was his job, do you recall?

A. He was night engineer there.

Mr. Neave: I offer in evidence Plaintiff's Exhibits 32, consisting of page 1 to 39, inclusive.

Mr. Lyon: The offer is objected to on the ground that the records are not shown to have been records of the company, and on the further ground that they are incompetent, irrelevant [718] and immaterial and have not

(Deposition of Albert Gaide)

been properly proven or identified, and further as mere hearsay.

(The exhibit was so marked.)

Mr. Neave: That is all.

Recross Examination

By Mr. Lyon:

RXQ206. You state this drain valve was in the cooler room, and that it was opened, therefore when it was opened it drained the water directly into the cooler room, didn't it?

A. Into the cooler room, somewhere in the basement.

RXQ207. And it drained it directly into the same part of the cooler room in which these brine coils were located, did it?

A. In the sewer, somewhere in the sewer. These sewers were all trapped.

RXQ208. It drained right into the part of the building the coils were in?

A. I don't know. It dropped down in the corner of that refrigerator room.

RXQ209. It dropped right down in the same space that was occupied by the coils, didn't it?

A. Yes.

Redirect Examination

By Mr. Neave:

RDQ210. Do you mean it went down through a pipe or through the air? [719]

A. No, no. There was a pipe dropped down somewhere. I don't know how far down it went, and where it hooked onto, that I don't know. I know there was a pipe on the drain valve.

(Deposition of Albert Gaide)

RDQ211. That is, the valve you turned off and on was in the pipe, the valve was in a pipe?

A. Sure.

RDQ212. Then this water was drained off?

A. It went off to a sewer. I don't know whether it led into a sewer or to the floor below, I don't know.

RDQ213. Do you recall whether this pipe went down inside or outside of the refrigerator coils?

A. That I don't know. It was inside the room but whether it jumped out there somewhat, I don't know.

RDQ214. You don't know? A. I don't know.

Mr. Neave: That is all.

(The signature of the witness was waived by stipulation of the parties.)

Mr. Neave: Mr. Lyon, yesterday you asked the witness, Mr. Tominac, to produce the letter to which he referred as having been received by him from Mr. McCarthy. Mr. Tominac stated that he would try to find the letter and give it to Mr. Lietz, who is to be a witness this morning.

Mr. Lietz has handed to me a letter from J. S. McCarthy to Nicholas L. Tominac, dated October 16, 1944, and I am [720] turning it over to Mr. Lyon.

Mr. Lyon: I would like this letter marked for identification as Defendant's Exhibit B.

This letter is dated October 16, 1944, to Nicholas L. Tominac from J. S. McCarthy.

(Said letter was so marked.)

Mr. Neave: The next witness was Herman Leopold Lietz, who was the assistant chief engineer of the Carnegie-Illinois Steel Company, South Works, and had been

(Deposition of Albert Gaide)

with the company since 1909. The drawings of the company are in his custody. He produced the original photograph of which Plaintiff's Exhibit 30 is a photostat.

Mr. Lewis Lyon: There is also a stipulation on page 87 and 88.

Mr. Neave: Yes, there is a stipulation there. There was no cross examination?

Mr. Lewis Lyon: No.

Mr. Neave: There was no cross examination of that witness. There is a stipulation on page 85, which should be put in the record, and the witness produced the original tracing of the drawing, of which Plaintiff's Exhibit 31 is a blueprint, and he identified the blueprint as an exact copy of the tracing.

Mr. Lewis Lyon: And there is a stipulation on page 87 and 88 that should be included in the record. [721]

Mr. Neave: Yes, quite so. There is a stipulation on page 87 and 88 that if George Steudel were called he would testify that the operating engineering records of the dry blast plant in the South Chicago Works are no longer in existence, as they were destroyed four or five years ago.

HERMAN LEOPOLD LIETZ,

called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Neave:

Q1. What is your name?

A. Herman Leopold Lietz.

Q2. And your residence address?

A. 10728 So. Avenue C, Chicago, Illinois.

(Deposition of Herman Leopoul Lietz)

Q3. What is your occupation, Mr. Lietz?

A. Right now I am assistant chief engineer of the South Works, Carnegie-Illinois Steel, at South Chicago.

Q4. How long have you been employed by the Carnegie-Illinois Steel Company or its predecessor, the Illinois Steel Company?

A. Well, I started to work in February, 1909 for the Illinois Steel and I have been there since.

Q5. As assistant chief engineer, are the drawings and engineering records of the Carnegie-Illinois Steel Company, and its predecessor the Illinois Steel Company, in your custody? [722]

A. They are.

Q6. Are you familiar with the various South Chicago plant buildings?

A. Yes. What do you mean, the method of construction?

Q7. No. I mean generally, the layout of the buildings?

A. Yes.

Q8. Will you state whether the Illinois Steel Company ever operated a dry blast plant?

A. Yes, they did.

Q9. Is that plant still in existence?

A. No. There is just one of the buildings that we remodeled, and it is now our metallurgical laboratory.

Q10. Do you know when the other buildings of the dry blast plant were demolished?

A. 1916.

Q11. What was your customary practice about taking pictures of your plant buildings?

A. Well, we generally take pictures when we are constructing any project around the plant, that is, a major project, and if there is any dismantling of a major project, we take pictures of the dismantling.

(Deposition of Herman Leopoul Lietz)

Q12. Have you any pictures of the construction of the dry blast plant?

A. No. They were destroyed when we dismantled the plant. [723]

Q13. I show you a photostat which is marked Plaintiff's Exhibit 30, and ask you whether you can produce from the records in your custody the original photograph from which this photostat was made?

A. Yes, I can.

Q14. Will you please do so?

A. (Witness produces a photograph).

Mr. Lyon: May I see that?

Mr. Neave: Yes.

(Handing photograph to Mr. Lyon.)

Q15. Is Plaintiff's Exhibit 30 a photostat of the photograph you have just handed me? A. This here?

Q16. Yes.

A. Yes, this is the photostat.

Mr. Neave: It is stipulated that the photograph produced by the witness may be placed in the custody of the Notary to have a photograph taken of the photograph produced by the witness. When this has been done, the Notary can then mark the photograph taken in place of that one produced by the witness, as Plaintiff's Exhibit 30-A, which is now offered in evidence in this case.

The Notary will then please return the photograph produced by the witness to Mr. Lietz at the Carnegie-Illinois Steel Company, 3426 E. 89th Street, South Chicago, Illinois, by [724] registered mail.

(The exhibit was so marked.)

(Deposition of Herman Leopoul Lietz)

Q17. Can you produce from the records of your company the original tracing entitled "Dry Blast Plant Refrigerator Building 6" Thawing Out Water Line Illinois Steel Co. South Works 12406"?

A. Yes.

Q18. Will you please do so?

A. (Witness produces a tracing.)

Q19. Would you compare the original tracing with Plaintiff's Exhibit 31 and tell me whether Plaintiff's Exhibit 31 is a photostatic copy reduced in size of that tracing?

A. Yes, I would say it is.

Mr. Neave: I offer in evidence Plaintiff's Exhibit 31.
(The exhibit was so marked.)

Q20. At my request, have you made a search of the records of your company for operating engineering data of the dry blast plant to which reference has been made, such as records of temperatures, humidity, moisture content, et cetera?

A. I made a search in the engineering department. That is the only place that we went to, as our records have all been destroyed with the exception of some of the tracings that are still available.

Q21. Is that the place where such operating engineering records would be likely to be? [725]

A. Operating records would not be in our file.

Q22. Where would they be?

A. If they still have operating records they should be in their blast furnace division.

Q23. Where was that, in South Chicago?

A. South Chicago.

(Deposition of Herman Leopoul Lietz)

Q24. Who is the man in charge there?

A. Mr. George Steudel.

Q25. How do you spell it?

A. S-t-e-u-d-e-l.

Mr. Neave: You may examine, Mr. Lyon.

Mr. Lyon: No cross examination.

Mr. Neave: That is all, Mr. Lietz.

(The signature of the witness was waived by stipulation of the parties.)

Mr. Neave: It is stipulated that if Mr. George Steudel was called as a witness he would testify that the operating engineering records of the dry blast plant in the South Chicago Works are no longer in existence, as they were destroyed four or five years ago.

Mr. Neave: The next witness, your Honor, is Alfred E. Mueller, mentioned by Mr. Tominac, and Mr. Mueller testifies not only to this Chicago prior use, but another prior use at the Northwestern Iron Company at Mayville, Wisconsin, by [726] which company Mr. Mueller was employed from 1909 to 1928. I would like to have the direct examination copied into the record, and I would like to read it.

The Court: To read it, you say?

Mr. Neave: Yes:

The Court: I will give you a rest for a few minutes.

(A short recess was taken.)

The Court: You may proceed.

ALFRED E. MUELLER,

called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. O'Hearn, Jr.,

Q1. Will you please state your full name?

A. Alfred E. Mueller.

Q2. And your residence?

A. 9371 River Shore Drive, Niagara Falls, New York.

Q3. Where are you employed, Mr. Mueller?

A. Tonawanda Iron Company in North Tonawanda, New York.

Q4. Were you ever employed by the Illinois Steel Company?

A. I was employed by the Illinois Steel Company in 1908 and 1909, the South Works plant.

Q5. What was your job while you were with the Illinois Steel Company?

A. My first job down there was working for the Vilter [727] Manufacturing Company while we were erecting the dry blast plant there, and when the plant started operating I got an engineer's license and then was hired by the Illinois Steel Company as operating engineer. I ran one shift of the plant opposite to Mr. Gaide under Charles Leinert, Chief Engineer.

Q6. And what buildings made up the dry blast plant at that time?

A. There was only one main building, the compressor, and these other buildings were more or less attached to it. There was a compressor building and the pump room, the brine room, the brine cooler building and the refrigerator building.

(Deposition of Alfred E. Mueller)

Q7. Can you describe the arrangement of the refrigerator building?

A. The refrigerator building was a large tall building with no windows, about—I won't give you the dimensions, I don't believe you are interested in the dimensions, but the inside was divided into seven compartments, and each compartment ran from the basement clear up to the top floor, about sixty feet high, and each compartment had a coil of pipe, 2-inch coil. This coil of pipe was composed of a header 10-pipes wide and then 2-inch pipes 40 feet long, and 102 pipes high.

The Court: Wait just a minute. Forty feet long and how far apart? About 6 inches, it would be, if it was a building of 60 feet. [728]

Mr. Neave: Ten pipes wide.

The Court: Oh, it is 10 pipes wide, 102 pipes high and 40 feet long?

Mr. Neave: Yes, sir.

The Court: All right. And about 60 feet high.

Q8. What was done in this refrigerator building?

A. In this refrigerator building through this pipe coil the refrigerated brine was circulated, the idea was to cool the air which passed over these pipes. The reason was to cool the air so it deposited its moisture, and from there it was piped over to the blast furnace and the Bessemer converters.

The Court: Can I interrupt you a moment? Is there to be any testimony anticipated as to the freezing effect of brine? I suppose brine is their trade name for some kind of a solution?

Mr. Neave: Yes, we will have some testimony explaining the action of various refrigerants. The brine here used

is brine that has been cooled to any degree that you want, and passed through pipes, and then that cools the pipes.

The Court: Well, for the cooling, they just dribble water over it to cool it?

Mr. Neave: There are two different things that must not be confused. One is the use of brine to cool the pipes, and then they defrost with brine.

The Court: I understand that. I am not confused in that. [729] I am talking about the refrigerant now.

Mr. Neave: The refrigerant here is the brine that goes inside the pipes.

The Court: Inside the pipes. Have the witnesses in this deposition testified it went through the coils and over the coils, the brine?

Mr. Neave: No, that is not brine in that. That is ammonia in that system.

The Court: Oh, this is ammonia here, and the brine was down here (indicating).

Mr. Neave: No, in this system, your Honor, no brine was used (indicating model).

The Court: He testified they had ammonia and it blew up the building, and then they put it in with brine.

Mr. Neave: Let me explain it. First of all, in the original system there was ammonia gas, and that was used,—

Mr. Lewis Lyon: And it blew up the building.

Mr. Neave: That was used, and it blew up the building. The next thing that happened was that they used brine in the pipes for refrigerating.

The Court: Yes.

Mr. Neave: Then they also used brine for defrosting for a short period.

The Court: I remember that.

Mr. Neave: Then thereafter— [730]

The Court: They used water.

Mr. Neave: —they used water for defrosting. That is my recollection of it.

The Court: But the only thing I am concerned about now, and the question that is going through my mind—and I don't know, maybe it isn't relevant or material—is the action of different refrigerants passing through a coil or pipe that is 10 pipes wide and 102 pipes high, and which is 40 feet long, what effect that would have. What would that do—how cold would it make it?

Mr. Neave: We can have some testimony on that for your Honor.

The Court: I am not asking for it.

Mr. Neave: I think it would be interesting.

The Court: Well, is it material?

Mr. Neave: No, I don't think it is, because you can make it as cold as you want, as I understand it.

Mr. Lewis Lyon: Or as hot as you want it.

Mr. Neave: Or as hot as you want it. It just depends upon the temperature to which the brine is cooled. But we will have some testimony in order to make that clear.

The Court: This brine entered here, and it went 40 feet 102 times, didn't it?

Mr. Neave: That is right.

The Court: Forty feet by 102. That traveled, then, [731] 4,080 feet. Does brine get cooler the farther it travels?

Mr. Neave: No, it gets warmer.

Mr. Lewis Lyon: It gets warmer.

Mr. Neave: Yes, when it comes out it is at a warmer temperature than when it enters.

The Court: And one of the temperatures it entered—one of the depositions stated that it was 35 degrees when it entered?

Mr. Neave: Thirty-five when it came out.

The Court: Thirty-five when it came out?

Mr. Neave: Yes, that's right.

The Court: What would that freeze?

Mr. Neave: That would be at the bottom, the lower-most pipes. You see, the air comes in at the bottom in these plants and goes up, and the brine comes in at the top in the pipes and goes down, and the cold brine is at the top.

The Court: What makes brine freeze? The pressure on it?

Mr. Lewis Lyon: Brine doesn't freeze.

Mr. Neave: It doesn't freeze. What makes it cold?

The Court: What gives the chilling effect?

Mr. Neave: As I understand it, how they cool it is that the brine is a solution of water and salt, some sort of salt, and that is passed through a pipe, and there is another pipe around that pipe which has ammonia in it, and that ammonia and gas, whatever it forms, cools the brine. [732]

The Court: What makes the ammonia cool the brine?

Mr. Neave: Because the ammonia evaporates into a gas, and that makes it cold. I explained that in my opening statement, your Honor, but we will have same testimony on that so that it will be clear what the action is of refrigerating. It hasn't got anything to do with this particular matter, but I think it is of interest.

The Court: If it hasn't anything to do with it, there is no need of putting it in evidence, but you have to convince me it hasn't anything to do with it.

Mr. Neave: That is right; so we will have some testimony.

The Court: Because you are introducing this testimony on prior art, prior use, and prior sale, and so on, and so forth.

Mr. Neave: That is right.

The Court: This is just a question that arose in my mind, as to how could it would get.

Mr. Neave: Well, you can get your pipes cold by various methods. One is by using ammonia gas, or any other gas.

The Court: So far there isn't any testimony as to the temperature of the brine when it was introduced into either the Pittsburgh plant or the Carnegie plant.

Mr. Neave: Yes, your Honor.

The Court: As to the temperature of the brine?

Mr. Neave: Some of these records in Plaintiff's Exhibit [733] 32, your Honor, have brine temperatures on them.

The Court: I know that.

Mr. Neave: They have brine temperatures. I am looking at one, for instance, of June 16th that shows the brine feed at 9 A. M., and the feed was 21.5 degrees and the return was 39 degrees. That was in the summertime, and the outside temperature was 76. The temperature of the air at the outlet was 30.5. You see, the brine came in cold at the top and the air comes in hot at the bottom, at 76 from the outdoor atmosphere.

The Court: He didn't testify the brine came in at the top.

Mr. Neave: I am not sure whether or not he did, but there is some witness there who does testify. You see, we haven't read all of these depositions.

(Deposition of Alfred E. Mueller)

The Court: All right.

Mr. Lewis Lyon: The material fact in that respect, however, your Honor, is that all of the brine when it was pumped out of the coil, all of the brine when it was all mixed together, was 35 degrees, and that is the testimony of the last witness.

The Court: All right. We will see what happens. I just wanted to let you know what was in my mind.

Mr. Neave: That brine after it is pumped into the top has been cooled.

The Court: You mean it is cooled down to 35 degrees? [734]

Mr. Neave: No, it is 35 as it leaves the pipe. It is cooled—

The Court: Before it goes back into the system?

Mr. Neave: Before it goes back into the system, that is right, your Honor.

Q9. How was the air controlled in passing through this refrigerator building?

A. Well, each compartment down in the basement underneath the coils had two openings where the air entered. These openings were closed with shutters or wooden sliding doors, and then on top of the compartment there were two cast-iron shutter valves that took the air off at the top of the compartments and led it by means of two branch pipes into a main header, 8-foot diameter pipes, that went over to the blowing engines.

Mr. Neave: There, your Honor, you get the point.

The Court: All right.

Mr. Neave: Q10. You testified, Mr. Mueller, that the idea was to remove the moisture from the air, and that was deposited on the pipes, or coils, in the form of frost?

(Deposition of Alfred E. Mueller)

A. It was deposited—Until the lower coils were wet they were not frosted, and then as you went higher up the brine was colder and there the pipes were frosted.

Q11. How was this frost removed from the pipes?

A. Well, after a compartment accumulated a certain [735] amount of frost, we started to defrost it. To do that we pumped the brine out of the coils and sprinkled them with water.

Q12. Where did the water come from?

A. This water that we used for sprinkling was waste water from the ammonia condensers that came off of the top of the compressor building, from the bottom of the ammonia condensers and was piped over to the refrigerator building, and from there it was taken by means of pipes to the compartment which was to be thawed off.

Mr. Neave: Now, you see, your Honor, the ammonia condenser condensed the ammonia which was used to cool the brine.

The Court: There was some place along the line the brine passed through the ammonia and was cooled.

Mr. Neave: Was cooled, that's right.

Q13. Was there any means to drain this system of water pipes?

A. Oh, yes. The pipe coming over from the ammonia condensers before it entered the refrigerator building had a valve there. When this valve was closed, of course, there was no water that went into the refrigerator building. And then the water that had been in there before, that was drained out. We had a drain valve on the other side of this valve as it entered the building, so when you were not defrosting this pipe was drained of water. [736]

(Deposition of Alfred E. Mueller)

Q14. You stated that you alternated with Mr. Gaide in operating this plant. What guided your actions in operating the plant? What records did you have to follow?

A. The chief told us where we were to keep the humidity of the air. The purpose of the plant was to dry the air. He told us where we were to keep the humidity, so many grains per cubic foot. We had a record that they took of all the temperatures on the top of the coils and the bottom, the brine feed and the brine return, and the temperature of the atmosphere, and according to that we ran our compressors, we speeded them up or closed them down.

Q15. Did you ever take this temperature yourself?

A. Oh, yes. I had to take it, not only to check the record man but sometimes the record man was not available or was not there and I had to take it myself.

Q16. What was the temperature of the brine that went through the coils in the refrigerator compartment?

Mr. Lewis Lyon: Objected to as not the best evidence.

The Court: Overruled.

A. The feed ran all the way from, I would say, 15 degrees to around 20 or 24 degrees, and the return, of course, that varied with the load of how many furnaces we had operating and how many Bessemer converters were running. It depended on the cooling load it had to take care of.

Q17. What was the temperature of the air at the top of the [737] coil?

A. The temperature of the air—Maybe the brine, probably I should have given that a little lower because it usually ran a little lower. The temperature of the air ran from 20 to 30 degrees,—34.

(Deposition of Alfred E. Mueller)

Q18. Do you have with you, Mr. Mueller, any record of the temperatures that were taken at the South Works plant?

A. Yes, I have one that is more or less of a synopsis of one day's operation.

Q19. Is this chart in your own handwriting?

A. This is a carbon copy of my own handwriting.

Mr. O'Hearn, Jr.: Q20. Where has this chart been since you made it, Mr. Mueller?

A. I have had this chart ever since I made it. It has always been, so far as I know it has always been in this book here (indicating). I had some other notes, records of the dry blast plant that I kept for my own information, my own amusement, you might say, and I kept them in this book.

Mr. O'Hearn, Jr.: Could we have this chart marked (Plaintiff's Exhibit 33, for identification).

(Said chart was marked for identification.)

Q21. Is there a date on this report, Mr. Mueller?

A. It is dated May 17 to 18, 1908.

Mr. Lyon: Where?

The Witness: May 17 to 18, 1908, ending May 18th, at [738] 6 A. M. It looks like 11, is that what you mean? It is 17. I don't know why it don't show better.

Mr. O'Hearn, Jr.: Q22. How does it happen that this chart shows the temperature for a full 24-hour period?

A. Once every two weeks the operating engineer works 24 hours to let his partner off 24 hours, and that always was on a Saturday to Monday, and this happened to be one day when I was on a 24-hour turn. That is one reason I kept the thing, as a memento of a 24-hour shift. I was on this 24 hours.

(Deposition of Alfred E. Mueller)

Q23. Starting at the left side of the chart, we have the first column which is the "Time" and then we have the second column, "Weather Conditions." Then, we come to the third column headed "Temperature" and a sub-heading "Atmosphere." Will you explain what the figures in that third column represent?

A. The column "Atmosphere Temperature," that shows us the temperature of the outside air as it entered the fan before it entered the refrigerator building. That is the outside temperature.

Q24. The fourth column from the left is headed "Top of Coil." Would you give us what the figures in that column represent?

A. We had two thermometers on top of the coil, one was an ordinary mercury thermometer and the other was a liquid thermometer. Which one of these it was, I don't know but I [739] think this was an ordinary mercury thermometer that was inserted in this 8-foot steel pipe on top of the refrigerator building, and that temperature was read hourly by the record man, and that is reported in this fourth column.

Q25. The next column, the fifth from the left, has a heading: "Psychrometer" and a sub-heading "Inlet" and under that a heading "Dry." Would you tell us what the figures in that column represent?

A. Well, a psychrometer is a combination of two thermometers; one has only an ordinary thermometer with a dry bulb and the other thermometer has a piece of wet muslin around the bulb.

Q26. And what are the figures in that column under the head "Wet"?

(Deposition of Alfred E. Mueller)

A. Those two columns are tied together. To get a psychrometer reading you must have the dry bulb and the wet bulb temperatures because from the difference of those two is how you determine the moisture in the air.

Q27. Then, in the seventh and eighth columns we have the headings "Psychrometer Outlet Dry" and "Wet." Could you tell what the figures under those columns represent?

A. The air that was dried in the refrigerator building, a sample of that air was drawn down through a pipe, back into the inlet of the fan, and on its course down to this fan it ran over two thermometers, one a wet-bulb thermometer and the [740] other a dry bulb. By the difference between these two thermometers we got the moisture in the air after it had gone through the refrigerator building.

Q28. Then, the last two columns on the right of this chart have the headings "Moisture Grains Per Cu. Ft. Inlet" and "Outlet." Can you explain the figures in those last two columns?

A. Yes. From the readings that we took on the wet bulb and the dry bulb on the inlet,—we had a table and that table showed us what the moisture would be in grains per cubic foot corresponding to those two temperatures, and that was reported in the eighth column for the inlet and in the ninth column for the outlet.

Q29. Mr Mueller, down near the bottom of this chart I see in the second column the words "Average Day." Can you tell me what the average temperature at the top of the coil was for that period covered by this chart?

A. Well, the average temperature for the day turn, his average here was 67.666 degrees. That is for the day turn.

(Deposition of Alfred E. Mueller)

Q30. That was atmospheric temperature?

A. That was for the atmospheric temperature, outside temperature.

Q31. What was the temperature at the top of the coils, the average temperature?

A. The average temperature for that day turn was 25.34. [741] It looks like a misplaced decimal point there.

Q32. During the time that you were at the South Works plant, did you ever have any trouble with water freezing in the supply pipes or the spray headers over the coils in the cooling compartment?

A. No. We never had trouble with that.

The Court: Before you get off of this subject here, what was his answer as to the top of the coil? That is taken on the coil itself.

Mr. Lewis Lyon: That is right.

Mr. Neave: No, I believe not; not on the coil itself. It is taken in the air above the coil.

Mr. Lewis Lyon: That is not true.

The Court: Immediately above the coil?

Mr. Neave: No. Your Honor, we will go back to page 97, the answer to question 27:

“A. The air that was dried in the refrigerator building, a sample of that air was drawn down through a pipe, back into the inlet of the fan, and on its course down to this fan it ran over two thermometers, one a wet-bulb thermometer and the other a dry-bulb. By the difference between these two thermometers we got the moisture in the air after it had gone through the refrigerator building.”

The Court: That is at the outlet, the dry and wet reading? [742]

Mr. Lewis Lyon: That is the wet bulb reading.

The Court: That is the temperature of the air?

Mr. Lewis Lyon: That is correct.

Mr. Neave: That is what we are talking about.

The Court: In other words, let us take 7 o'clock in the morning on this day the atmospheric temperature was 63. That was just the outside air on top of the coil?

Mr. Lewis Lyon: That is the coil temperature.

The Court: That is the coil temperature; isn't that right?

Mr. Neave: No, your Honor.

The Court: That is the air?

Mr. Neave: That is the air on top of the coil. There were two different sets of readings.

The Court: I understand he has three sets of readings.

Mr. Neave: Well, temperature readings. One of air, one was the psychrometer reading.

Mr. Lewis Lyon: No, your Honor; that is the coil temperature.

Mr. O'Hearn: No, it is not.

Mr. Neave: If your Honor will look at the chart—

The Court: I have it here.

Mr. Neave: —at the top you will see the word "air" spread across.

The Court: Yes, air. [743]

Mr. Neave: Underneath that is "temperature" "atmosphere" and "top of coil."

The Court: And "Psychrometer Inlet—Outlet, Dry and Wet." Those are all temperature readings.

Mr. Neave: All of the air.

The Court: Then I can't understand this witness' testimony.

Mr. Neave: Let us go back.

The Court: I will explain it. As I understood him to say, he said the temperature at the top was the temperature taken at the blower after the air was cooled.

Mr. Neave: That is right.

The Court: Isn't that right?

Mr. Neave: That is right.

The Court: Then the outlet temperature over here, he says that is the same thing, and dry it was 66 degrees and wet it was 46.5 degrees. So how could he have 46.5 degrees and 23.4 degrees at the same place?

Mr. O'Hearn: That is not at the same place.

Mr. Neave: Let us go back.

The Court: Let me see. He says the inlet temperature is taken by the psychrometer, the wet and dry, where the air comes in at the bottom. Is that right?

Mr. Neave: That is right.

The Court: And the outlet temperature is taken where the [744] air goes out, to correspond, at the top?

Mr. Neave: No, it was taken at a different place. It was taken, as I recall, in a pipe. Let's turn to question 27. The answer is:

"The air that was dried in the refrigerator building, a sample of that air was drawn down through a pipe, back into the inlet of the fan, and on its course down to this fan it ran over two thermometers,"—

The Court: In other words, that is the outlet air.

Mr. Neave: It comes from there and is drawn out.

The Court: It is the outlet air?

Mr. Neave: That is right.

The Court: It is from that that they determine the moisture content?

Mr. Neave: That is right.

The Court: —of the air going into the furnace?

Mr. Neave: That is right.

The Court: So whether they take it back or down, they were satisfied that was the place to take the temperature to accomplish the result of drying the air; is that correct?

Mr. O'Hearn: That is right. It is heated up while it is going down through the pipe.

The Court: But we haven't got that.

Mr. O'Hearn: That is explained in the cross examination.

The Court: All right. Now, wait a minute. This is: [745]

"Q24. The fourth column from the left is headed 'Top of Coil'. Would you give us what the figures in that column represent?

"A. We had two thermometers on top of the coil, one was an ordinary mercury thermometer and the other was a liquid thermometer. Which one of these it was, I don't know but I think this was an ordinary mercury thermometer that was inserted in this 8-foot steel pipe on top of the refrigerator building, and that temperature was read hourly by the record man, and that is reported in this fourth column."

Mr. Neave: That is right.

The Court: In other words, that is the air that went to the furnace.

Mr. Neave: That is correct; from that pipe. That is in an air vent pipe.

(Deposition of Alfred E. Mueller)

The Court: That is the thing that corresponds to the thing across the top here (indicating model)?

Mr. Neave: That is right.

The Court: And yet they determine the moisture content, which is what the whole operation was about, not from that air but from air measured some place, which is 46 degrees, or just twice as much?

Mr. Neave: That was air—

The Court: It sounds to me like somebody was mistaken. [746]

Mr. O'Hearn: No, your Honor. That is correct.

Mr. Neave: I think it will be explained in the testimony later on, as we come to it.

The Court: All right.

Mr. Neave:

Q33. Now, Mr. Mueller, you have testified that you worked at the dry blast plant of the South Works of the Illinois Steel Company until 1909. Where did you go from there?

A. When I quit down at Illinois Steel Company, I got the same sort of a job at the Northwestern Iron Company in Mayville, Wisconsin.

Q34. And you say you left the Illinois Steel Company in 1909?

A. It must have been about August, 1909.

The Court: By the way, this does not show which one of these seven rooms this was, this Exhibit 33, and there is no testimony about that, is there?

Mr. O'Hearn: Any one of them.

The Court: I don't know about that "any one of them." It is an exact record, and it purports to be of some thing.

Mr. Neave: That is right.

The Court: Was this during the defrosting? I suppose the cross examination will take care of that.

Mr. Neave: These were the temperatures taken while the plant was operating, while the units were operating. [747]

The Court: They would not all be the same.

Mr. Neave: Not necessarily.

Mr. O'Hearn: That is why they took the temperature up in the top column. It was the combined result of the six compartments they were operating.

Mr. Neave: You see, defrosting was done in only one at a time, and while it was being defrosted that compartment was shut off, and no air blown through there.

Mr. Lewis Lyon: And no record was taken of it?

Mr. Neave: That is right.

Mr. Lewis Lyon: These records were not taken during defrosting, but at some other time.

Mr. Neave: That is right. There was no record taken while defrosting.

The Court: On the matter of defrosting you are not contending that these were below zero?

Mr. Neave: Not below zero, your Honor.

The Court: Or below freezing?

Mr. Neave: Oh, surely.

The Court: You are contending that these pipes were below freezing?

Mr. Neave: Yes, your Honor, they must have been for this air to have been blown through there.

The Court: When the air was shut off and the refrigerant was taken out of the pipes? [748]

Mr. Neave: Certainly.

Mr. Lewis Lyon: 75 degrees air was blown in?

Mr. O'Hearn: No, it was shut off.

Mr. Neave: What happens, your Honor, is that you have these coils, a mass of coils in a compartment. Now, there has been air blown in those coils and the air comes out at the top at this temperature of 25, or whatever it may have been, below freezing. When you start to defrost those coils are cold. The first thing that is done is that the shutters are closed so that no air can blow through there, so that there is no warming agent coming into that compartment.

Mr. Lewis Lyon: That isn't the testimony.

The Court: Let him finish his statement.

Mr. Neave: That is what I believe the testimony to be. So that there is no air coming into that compartment. Now, those coils are cold. The refrigerant is brine and is taken out of those coils, pumped out. Those coils are covered with ice and frost; the whole room is covered. It is surrounded by other compartments which are operated, and which are cold. Then the water is turned on at the top in that compartment and it is defrosted.

The Court: In four hours?

Mr. Neave: That is right.

The Court: The whole operation is then that the air is opened from the bottom and room temperatures come in? [749]

Mr. Neave: No, sir.

The Court: That is what he testified.

Mr. Lewis Lyon: For one hour, and it dries the chamber.

Mr. Neave: While the defrosting is going on the shutters are all closed, and after the water has been turned off, and then they open the shutters, in order to dry off these pipes, and the brine that comes in is cooled off.

(Deposition of Alfred E. Mueller)

They pump the brine in, and then open the shutters, and it is cooled, and the place is cool.

Mr. Lewis Lyon: But the whole thing is dried before they permit that to operate, and they do that by bringing air in.

Mr. Neave: But while the water is showering down there is no air coming in.

The Court: Except the air in the water.

Mr. Neave: I beg your pardon?

The Court: Except the air in the water.

Mr. Neave: That is right.

Mr. Lewis Lyon: Your Honor will recall the testimony of the last witness that when the brine was pumped out it took 30 minutes, and it was pumped to the storage on the top of the roof, and the brine was 35 degrees when it was pumped out, and that is before the water was ever turned on.

The Court: I suppose we will get around to it. I just thought I would give all of you a chance to get a little [750] relaxation from the boredom of reading.

Mr. Neave: That is right, your Honor.

Q34. And you say you left the Illinois Steel Company in 1909?

A. It must have been about August, 1909.

Q35. And you went directly to Mayville?

A. Directly to Mayville, Wisconsin.

Q36. How are you able to place that date so accurately?

A. I don't remember the exact date, but one thing I base my recollection on, I was married September 9, 1909, I will never forget that, and I was married just about a month after I came up to Mayville.

(Deposition of Alfred E. Mueller)

Q37. What were your jobs while you were working for the Northwestern Iron Company in Mayville?

A. When I started at Mayville, Wisconsin, I was operating engineer. From there I progressed to chief engineer of the dry blast plant, and afterwards chief engineer of the blowing engines, the pump room and everything. Then, I got to be assistant master mechanic, and finally master mechanic.

Q38. And how long did you work for the Northwestern Iron Company?

A. I worked there about nineteen years. Sometime in 1928 I think I quit.

Q39. How did you happen to leave the Northwestern Iron Company in 1928? [751]

A. Well, it really was not the Northwestern Iron Company until then, because afterwards it became the Mayville Iron Company, and then it was sold to the Youngstown Sheet & Tube Company, and they started to dismantle the plant, and when I saw the place was folding up I thought it was time to get out.

Q40. And was the dry blast plant in operation up until the time you left?

A. It was more or less in operation up until the time the plant was torn down. That was in 1928.

Q41. What buildings made up the dry blast plant at Mayville?

A. In Mayville there were, you might say, three buildings, the compressor building and the pump room and the refrigerator room. The Mayville plant as a whole was smaller than the South Chicago plant because it only refrigerated the air for two small blast furnaces.

(Deposition of Alfred E. Mueller)

Q42. Can you describe the arrangement of the refrigerator building?

A. The general arrangement of the refrigerator building was exactly the same as at South Works, except that it was smaller. Instead of having seven compartments it had only four compartments, but the construction of the compartments was identical except the pipes were all shorter. Instead of being forty feet long they were only some twenty feet long. [752]

Q43. Was the air directed through the compartments there in a similar manner?

A. It was directed exactly the same way. The air inlet, the pipe construction and the number of pipes was practically the same if not identically the same as in South Works, and the air was controlled, top and bottom, the same way.

Q44. Was it also necessary to defrost the coils of the Mayville plant?

A. These coils were defrosted in Mayville by means of water, the only difference being that instead of taking the waste water from the ammonia condenser we took water directly out of the pump room well. We had a well that was connected with Rock River.

Q45. Will you describe the system of pipes whereby water was taken from the well and sprayed over the coils in the cooling compartment?

A. In the pump room we had a large well that was probably 10 or 15 feet in diameter. That was connected, as I say, by means of a 36-inch pipe with the river, and in this well we had the suction pipe of a centrifugal pump, and when we wanted to thaw out one of the compartments we started this pump, and that discharged the water into

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a header in the pump room, and this header had four branches, each branch having a valve and each valve having a pipe that went into one of these compartments in the refrigerator building, and in the [753] refrigerator building each of these pipes branches into six, I think six branches, and each branch had two 2-inch spray nozzles.

Q45. Was there any way to drain this system of piping?

A. Yes, there was. There were two ways of draining it, either we drained it through the centrifugal pump, and when the pump was shut down the water would automatically run back through the pump, or there was a drain connected above each valve in the header. That drain was always kept open so that in case one of these valves would leak you would not get water into the wrong compartment; and that valve was also used to drain it after the compartment was thawed.

Mr. O'Hearn, Jr.: Q47. Mr. Mueller, could you explain the operation of this pump so that we can understand how water could be drained through the pump?

A. Well, a centrifugal pump has no valves in it. It has a mere rotor like a fan, and while it is running it should fill with water, each of these vanes as it is rotating slings the water outward, and that causes it to go into a pipe and form a pressure in the discharge pipe. But when you take the power off this pump so there is nothing to drive the vanes, the vanes will stop rotating and the water will flow back again into the pump, and that usually causes the pump to run backward if there is any water there.

Q48. When this runs backward, can you hear the rotor? [754]

A. No. It don't make much noise. It is quiet but you can always see it on the pump coupling.

(Deposition of Alfred E. Mueller)

Q49. Can you tell by looking at the motor whether water is draining back through the pump?

A. Yes.

Q50. How often were the coils defrosted?

A. Usually we defrosted one coil every day. That was both in South Works and in Mayville.

Q51. How long did it take?

A. Normally from three to five hours, that is, the compartment was out of use that length of time. The water was actually sprayed on for maybe an hour and a half or two hours depending upon how much frost there was and the temperature of the water, and one thing and another.

Q52. While you were working for the Northwestern Iron Company at Mayville, was it ever part of your regular job to defrost the coils?

A. Well, as operating engineer it was part of my job, that is—

Q53. Can you explain step by step what you actually did in defrosting the coils?

A. When we wanted to defrost a compartment, the first thing I would do, I would go into the refrigerator building, shut off—say I wanted to defrost No. 1 compartment, I would shut off the brine return valve. Then I would open [755] the pump-out valve just ahead of the brine valve. Then I would close the two shutters down in the cellar to shut off the air.

Then I would go upstairs, up on the top floor, and close the rotary air valve. That shuts it off from the blowing engines. Then I would shut off the brine feed valve, then open an air vent valve that allowed air to go into the coils when we were pumping it out.

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Then I would go down below and then start the pump-out pump. This was a separate duplex pump that pumped the brine out of the coils. Then after the coils were empty of brine, which took about twenty minutes, then I would go down in the other pump room and start this centrifugal pump and turn the sprays into the No. 1 compartment, and start the water going up through the sprinkler head into the No. 1 compartment.

Then, depending upon my judgment how long it would take, normally about an hour and a half or two hours, I would shut the pump down, allow the water to drain out of the sprinkler heads and allow a few minutes for the water to drip off the coils, then go back into the refrigerator downstairs and close the pump-out valve and open the brine return valve. This would allow the brine to fill the coils again. That would take normally about half an hour to fill the coils again.

Then, I would go up on the top of the refrigerator and [756] there in this vent pipe which allowed the air to enter there was a glass gauge that showed when the brine got up to the top of the coils. Sometimes I would have to wait a few minutes before it would show. When it showed brine in that glass gauge, then I knew the coil was full of brine. When the coil was full of brine then I would open the brine feed valve and allow it to circulate for a few minutes before I would open the air valve, to allow the cold brine to circulate into the pipes. Then I would open the shutter valve on top of the refrigerator and the two sliding doors at the bottom of the refrigerator, and then the compartment would be back in service, completing the thawing off.

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Q54. I now show you Plaintiff's Exhibit No. 7, which is labeled "Dry Blast Plant Northwestern Iron Company," and ask you if you can identify it?

A. What was that number you had here?

Q55. It is Plaintiff's Exhibit 7.

A. Yes. This is a drawing of the refrigerator building at the Northwestern Iron Company at Mayville, Wisconsin. It shows the four compartments and the general arrangement of the building.

Q56. Does this drawing also show the spray headers positioned over the coils in one of the compartments?

A. Yes, it does. It shows there were twelve spray headers in each compartment, over each coil. [757]

Q57. And this is depicted in the figure at the left of the drawing in the upper part of the figure?

A. Yes, that is right.

Q58. And does this show a section of the riser which supplied water to these spray headers?

A. It does not.

Q59. Is a section of the riser shown in the left figure on this drawing?

Mr. Lyon: Objected to as already asked and answered.

The Court: Overruled.

A. It shows a short part of it just at the beginning of the riser, or rather the end of the riser. The rest is not on here.

Mr. O'Hearn, Jr.: Q60. Mr. Mueller, I show you Plaintiff's Exhibit 8, also labeled "Dry Blast Plant Northwestern Iron Company," and ask you if you can identify it?

(Deposition of Alfred E. Mueller)

A. This is a plan of the dry blast plant, both the compressor room, the pump room, fan room, the refrigerator and the general pump room, the pump room that supplied all the furnace pumps.

Q61. Does this drawing show the water pipes which you have previously described?

A. It shows the spray pipes in the four compartments of the refrigerator.

Q62. And you are now referring to the upper left-hand [758] figure in the drawing?

A. The upper left-hand corner of the drawing, yes. That shows the refrigerator building and the spray piping over the coils.

Q63. Mr. Mueller, does this drawing show the header in the pump room which you previously testified to?

A. It shows the header up to where the pump would be, but the pump is not shown here.

Q64. Could you take this pen, Mr. Mueller, and by drawing a circle show about where the pump was?

A. Yes, I can. The pump was situated right there (indicating).

The Court: I don't have that before me. I don't know what you are talking about.

Mr. O'Hearn: That is No. 7 back here.

The Court: No. 7 way back here?

Mr. Neave: Yes, sir.

Mr. O'Hearn: 7 or 8, I believe.

The Court: I see.

Mr. Neave: No. 8 has the marking on it.

The Court: Oh, it is the same as 37. Very well. I have 37 here.

(Deposition of Alfred E. Mueller)

Q65. And will you label that "Pump"?

A. This is the pump. The motor was over here (indicating). It discharged into this header there. I am marking the dis- [759] charge pipe from the pump in to this header.

Q66. Will you draw a lead line to the header and label it "Header"?

A. (Witness does as requested.) This is the header.

Q67. Will you please, Mr. Mueller, draw a line to the spot where the valve controlling the water in these lines was?

A. There was a valve in each branch from the header just above this T here. [760]

Mr. Lyon: The valve "just above this T here" must be shown somewhere in section.

The Witness: Yes. The trouble is you see this section ends here.

Mr. O'Hearn, Jr.: Q68. You are now referring to Plaintiff's Exhibit 7 in the left-hand figure?

A. Yes. That pipe came down here (indicating) like this, alongside the refrigerator building on the outside, and then turned over into the pump room. The pump room is not shown here. The pump room was down here (indicating).

Q69. Now, referring again to Plaintiff's Exhibit 8, which does show the pump room, can you show us on one of the risers where the valve was?

A. There was a valve right in here underneath that elbow (indicating). I will show it over here. There was a valve in each of these here, right underneath that elbow (indicating). The same way here, each of these. There was a drain above the valve.

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Q70. Will you also draw a line to approximately where the drain was and label that "Drain"?

A. (Witness does as requested.) There was a small drain valve right here. It is kind of hard to draw it there. It is too bad this does not show more of it.

Q71. Was it part of your job at any time while you were at Mayville to take the temperatures of the brine and the [761] air?

A. The operating engineer has to take all his own temperatures in Mayville because it was a smaller plant and he only had an oiler to help him. He had to take all the temperature readings and record them himself. That was my job.

Q72. What was the temperature of the brine in the cooling coils of the Mayville plant?

Mr. Lyon: Objected to as not the best evidence.

The Court: Overruled. If he knows.

A. Well, that depended on the instructions of the furnace superintendent, whatever he wanted the brine. As a rule we carried a lower temperature than we did in South Works. It ran all the way from, I would say, 10 above to 25 above.

Q73. You have just produced same charts, Mr. Mueller. Can you tell us what they are?

A. These charts here—any one of them in particular?

Q74. You can take them up separately.

A. These are engine room reports, the dry blast engine room reports.

Mr. Lyon: Can I see what the witness is referring to?

(Documents handed to Mr. Lyon.)

Mr. O'Hearn, Jr.: Q75. Where did you get those charts, Mr. Mueller?

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A. We made two of these reports every day. This is the original, and then we had a carbon copy that was turned [762] in at the office, and these were kept in the dry blast plant for several years, and before I left, just as a matter of my remembrance of an old time I took some of these records along with me because they were of no value to anybody else.

Q76. Are those records in your own handwriting and were figures made by you?

A. On both of these I worked one shift. Now, this is dated October 6, 1910.

Mr. O'Hearn, Jr.: Could we have that one marked Plaintiff's Exhibit 34?

(The exhibit was so marked.)

Q77. You were saying something about that.

A. That one I was on the day shift and all the figures from 7:00 a. m. to and including the 5:00 p. m. readings are my own figures and are temperatures and pressures and revolutions that I myself recorded.

Mr. O'Hearn, Jr.: Referring to the other chart which is dated August 5, 1909, can we have that marked Plaintiff's Exhibit 35, for identification?

(The chart was so marked.)

Q78. Do you recognize the figures on Exhibit 35 as your own?

A. On this one I was on the night shift and all the figures from the 7:00 p. m. to and including the 5:00 a. m. are in my handwriting. [763]

Q79. On Plaintiff's Exhibit 34, for identification, what are the figures represented in the third column from the left?

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A. Those were the temperatures taken at the top of the coil, that is, they were the temperature of the air leaving the refrigerator.

Q80. Are all the temperatures shown there shown to be below freezing?

A. They are all several degrees below freezing.

Q81. I show you Plaintiff's Exhibit 35 and ask you what are the figures represented in the third column from the left in that exhibit?

A. Those are also showing the temperature of the air leaving the refrigerator, the top coils of the refrigerator.

Q82. And are all of those temperatures below freezing?

A. All of those temperatures are below freezing several degrees.

Q83. Do you have any other records of temperatures taken at the Mayville, Wisconsin, plant while you were there?

A. Yes, I have several other ones.

Q84. Would you produce them, please?

(A short colloquy was had between the witness and counsel, off the record.)

Mr. Lyon: The witness has produced some papers. May I see what these are?

The Witness: I have a lot more of these. Of course, [764] some of these I don't know who took them. They are not in my handwriting. I don't know anything about them.

Mr. Lyon: What was that statement with reference to these records?

(Discussion off the record between Mr. Lyon and the witness.)

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Mr. O'Hearn, Jr.: Could we have these records that Mr. Mueller has just produced marked as Plaintiff's Exhibits 36-A, 36-B, and so forth?

(Said records were marked Plaintiff's Exhibits 36-A to 36-I, inclusive, for identification.)

Q85. Mr. Mueller, will you look through this set of papers which you have just produced and which have been marked Plaintiff's Exhibits 36-A, 36-B, 36-C, and so forth, and looking on each chart at the third column from the left which is "Temperature Top of Coil" see whether all the temperatures recorded on these charts are below freezing?

A. These temperatures were all several degrees below freezing.

Q86. Can you identify the handwriting or the figures on any of these charts as your own?

A. Well, yes, I can some. The one marked 36-E dated August 4, 1909, the night turn on that, the figures from the 7:00 p. m. to 5:00 a. m., in the morning, those are my figures. [765]

Q87. Will you look through the rest of them, Mr. Mueller, and see if there are any more?

A. I don't think any of the rest were my own figures.

Mr. O'Hearn, Jr.: I would like to offer in evidence now Plaintiff's Exhibits 34, 35 and 36-E.

(The exhibits were so marked.)

Q88. During the time you were at the Mayville, Wisconsin, plant, Mr. Mueller, did you ever have any trouble with the water pipes freezing?

A. No, we never had any trouble with them.

Q89. Referring again to Plaintiff's Exhibits 7 and 8, will you state whether or not Plaintiff's Exhibits 7 and 8

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show the water piping system for the Mayville plant as it existed when you were employed there?

A. Well, the piping as far as it is shown here was the way we had it in Mayville. Of course, it is not complete. There was more to the piping that is shown, but what is shown is correctly shown.

The Court: On these charts, take that one on June 9th with the funny little doodles drawn in the right-hand corner, column 1, or line 1, 6:00 a. m., atmosphere 55, top of coil 24, psychrometer reading, on that entire page all of the thermometer readings is under the psychrometer readings. All of the temperatures under the psychrometer readings for outlet [766] dry are identical as the top of the coil, and on that one and on the next one down to where somebody apparently changed shifts at 4:00 o'clock p. m. on June 10, at 3:00 p. m. on June 10 the top of the coil reading was 27, the outlet dry was 27 and at 4:00 o'clock the top of the coil was 27 and the outlet dry was 90. Could that be when they were defrosting?

Mr. Lewis Lyon: Probably, your Honor.

Mr. O'Hearn: I can explain that, your Honor.

The Court: Was there anything in the evidence to explain it?

Mr. O'Hearn: Yes, in the cross examination I think there is.

Mr. Neave: I don't know if there was anything about that particular temperature.

Mr. O'Hearn: Not about that particular one.

Mr. Neave: But cross examination does explain these charts.

The Court: All right. Do you want to offer the cross examination?

Of course this doesn't indicate the temperature thawing it out.

Mr. Neave: There is no testimony that these were taken at the time of the thawing.

The Court: All right. But I still cannot understand how a temperature—there is one here—30 degrees top of [767] coil and 106 degrees outlet dry. That is 76 degrees that the air would change in a few feet of travel.

Mr. Neave: I can't understand that, your Honor.

Mr. O'Hearn: I can.

Mr. Neave: Maybe Mr. O'Hearn can explain it.

The Court: Maybe cross examination will explain it.

Mr. Lewis Lyon: I am looking at the cross examination but I don't see any explanation of it in there either.

The Court: Do you offer the cross examination?

Mr. Lewis Lyon: I would like to have the full story in front of the court, yes, your Honor, as far as it is developed. I don't know that there is any need to read it unless your Honor so desires. There are certain points of it as to the temperature of the return brine and the brine that was pumped out that corresponds with the previous witness' testimony.

We will offer it and it can be used for the purpose of the record for argument at any time or in pointing out anything that is material from it, but I certainly want to have the whole story before the court.

The Court: Why don't you go ahead and read it then?

Mr. Lewis Lyon: I will read from page 122:

"A. That return brine would run around 34, 35, 36 degrees.

"XQ113. That was the general practice to keep it 34, 35 [768] or 36 degrees at the return?

"A. About that. Of course, it varied."

There is no testimony in here of any temperature conditions that were taken by any of the witnesses during the time of defrosting except the one temperature.

The Court: Where did you just read from?

Mr. Lewis Lyon: Page 122 at line 3 to line 6.

The reason for leaving the chamber off from further use for a period of two or three hours after that is, as the witness testified, in order to dry out the chamber before even the hot brine was returned to it, that is, the brine at 34, 35 and 36 degrees before the brine circulation valve was opened to permit brine to circulate back to the cooling source.

There was a very pertinent reason for that, which we will show, and that it was essentially to avoid a humid blast of wet air being thrown into one of these furnaces so you would have to dry the chamber out before you ever let the air recirculate.

The Court: All right. The cross examination is in the record.

Mr. Neave: I want to call your Honor's attention to page 135 of the cross examination which stresses the point which you are bringing out.

"XQ193. Have you any figures which show the temperature of the air in that steel collector pipe at the top of the [769] cooling room?

"A. Oh, yes. That whole column of figures—wait a minute. What are we referring to?

"Mr. Neave: Plaintiff's Exhibit 33.

"The Witness: That is in the fourth column.

"Mr. Lyon: XQ194. Those are the temperatures of the air as it actually existed in that tunnel, are they?

"A. In that steel pipe.

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"XQ195. In the steel pipe?

"A. Yes.

"XQ196. Where?

"A. Those temperatures were taken way at the end of the last compartment, the fourth compartment—the seventh compartment, way at the end, just as the air left the—wait a minute. How am I going to say that? At the farther end of the refrigerator building, not at the inlet end but at the outlet end of the building.

"XQ197. Those temperatures were taken in the steel pipe, and that steel pipe in that 8-foot pipe after it had collected air from all of the compartments that were operating, is that correct?

"A. That is right; yes."

The Court: What is he talking about, the temperature or psychrometer readings?

Mr. Neave: No, this is the dry bulb reading here. [770]

Mr. O'Hearn: Top of the coil.

Mr. Neave: That is right. This is a regular thermometer that is put in that particular place.

The Court: Let me catch up with you first.

"XQ186. And the discharge temperatures were of the air in the tunnel leaving the cooling building, were they not?

"A. Pardon?

"XQ187. And these outlet temperatures, both wet and dry bulbs, were the temperatures of the air in the tunnel leaving the refrigerator room, were they not?

"A. That was not a tunnel. That was a steel pipe on top of the refrigerator."

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That is the same idea.

Mr. Neave: Yes, the air was collected, as I understand it, from all the compartments.

The court:

"A. That was not a tunnel. That was a steel pipe on top of the refrigerator.

"XQ188. Those were the temperatures in that pipe?

"A. In that pipe, yes. That is, these temperatures shown here are not the temperatures of the air taken out of that pipe. In taking the samples of air out of this pipe and bringing it down to where we took our readings it warmed up and we took these temperatures from the warmed-up air.

"XQ189. How far did that air travel? [771]

"A. That traveled, oh, I would say, 150 feet.

"XQ190. And in what size pipe?

"A. 2-inch pipe. 2 or 2½ inch. I am not so sure of that."

I don't understand that.

Mr. Neave: Let me explain it. There is a header at the top that collects the air, a pipe that collects the outlet air, refrigerated air, and some readings are taken there and those are the top of the coil readings.

Then there is a tube that goes down from that about 150 feet, which is a sampling of air, that leads down to the engine room, and these other temperatures are taken from that sampling.

That is my understanding of it.

The Court: It doesn't say it here.

"A. Those temperatures were taken way at the end of the last compartment, the fourth compartment—the

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seventh compartment, way at the end, just as the air left the—wait a minute. How am I going to say that? At the farther end of the refrigerator building, not at the inlet end but at the outlet end of the building.

“XQ197. Those temperatures were taken in the steel pipe, and that steel pipe in that 8-foot pipe after it had collected air from all of the compartments that were operating, is that correct?

“A. That is right; yes.” [772]

Mr. Neave: If you go on, your Honor, you will see on the next page it explains this, that is, the 8-foot pipe at the top.

The Court: The witness says in the fourth column. What is the fourth column?

Mr. Neave: That is the top of the coil reading.

The Court: Down on line 11 he says:

“XQ198. At a point beyond the top of the refrigerator room?

“A. Yes.

“XQ199. How far beyond?

“A. Oh, ten feet.

“XQ200. Where was the point of taking, with respect to that temperature, taking the air, at which these psychrometer readings were taken?

“A. Approximately the same place. Inside of this 8-foot diameter pipe we had a funnel probably a foot in diameter, maybe two or three feet long, and this funnel tapered down to a 3-inch pipe, and then led out through the wall of this 8-foot pipe and down back into the fan room. That, as I say, was about 150 or 200 feet of 2-inch pipe which it took to bring it down there.

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"XQ201. And did that pipe pass through the outdoors, through which the air was conducted?

"A. It passed outside of the building all the way down. [773]

"XQ202. All the way?

"A. Yes. On a hot summer day when the sun would be beating on there, that temperature went up considerably high. You can see some of the—well, that is not in the record.

"XQ203. How high did it go?

"A. I see some records here of 106 degrees.

"XQ204. Where the wet and dry bulb psychrometer temperatures went up to 106 degrees?"

I guess that is about all there is in there about that. That means that you gentlemen certainly have something to argue about at the appropriate time.

Mr. Neave: Yes.

I just want to add a word there, that the temperatures that have been taken in the 8-foot pipe at the top are the temperatures of the air and the air that was led off through this smaller pipe down 150 feet were for other readings for the moisture content of the air. They had to know what the temperature was in order to get the moisture temperature, and what they were doing it for was for the moisture content. You have to figure that out.

The Court: You mean when that the air is hot there is more moisture?

Mr. Neave: No, it is the other way. I will have to get an expert to tell you about that.

The Court: All right. [774]

(Deposition of Alfred E. Mueller)

Cross Examination

By Mr. Lyon:

XQ90. You have referred, I believe, Mr. Mueller to what you have defined as two operations, one which I believe you have stated to be the South Chicago operation and the other the Mayville operation, is that correct?

A. Yes.

XQ91. The so-called South Chicago operation being the one which you state was conducted at the Illinois Steel Company in South Chicago, Illinois, is that correct?

A. Yes.

XQ92. And the Mayville operation was the operation which you state was conducted at the Northwestern Iron Works, or Iron Company, at Mayville, Wisconsin, is that correct? A. That is correct.

XQ93. Will you state the circumstances and time when you dug up these records concerning both of these operations?

A. As far as "dug up", are you referring to the time Mr. McCarthy called on me?

XQ94. That is right.

A. Well, one Sunday afternoon I happened to be home, the telephone rang and somebody introduced himself as Mr. McCarthy and said he would like to see me. He wanted to know if I had ever worked at South Works. I told him I had back in 1908 and 1909. [775]

XQ95. When was this call?

A. This was shortly before Christmas. I would say around the middle of December.

XQ96. Of what year? A. Of last year, 1944.

So Mr. McCarthy came up to the house and he asked me if I had worked at South Works, and I told him I

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did, and he wanted to know what I knew about it. So I says. "Well, I have got a complete description of the plant. I have got it all here in the house."

So I went up and dug around in some of my old records and got out this book here. I had it for my own information. I had written a complete description of the dry blast plant in South Works, South Chicago. He was very interested in it and looked it over, took it along with him and had some of it photostated, and outside of when he returned it to me I got a note, that is all I talked to Mr. McCarthy.

XQ97. Did you discuss at that time also this Mayville operation? A. Yes, we did.

XQ98. And did you deliver to him at that time these Mayville records?

A. No, I did not. Yes I did, too. Wait a minute. No, I did not.

XQ99. You told him, however, of your information with [776] respect to the Mayville operations at that time? A. Yes.

XQ100. That was in December of 1944?

A. Yes.

XQ101. How much later was it that you delivered to Mr. McCarthy these sheets that you have here identified with reference to the Mayville operation?

A. Mr. McCarthy, outside of when I showed them to him, when he saw them in my house the middle of December, why, he has not seen them since.

XQ102. But you did show them to him at that time?

A. I did.

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XQ103. Did Mr. McCarthy state who he was employed by at the time he called on you?

A. He told me he was representing the General Electric and others. Who the others were, I did not know. I did not know then; I do know some of them now.

XQ104. Have you since learned who he was representing?

A. Outside of General Electric and York, that is all I know.

XQ105. In testifying with respect to the South Chicago operations, you testified on direct examination with respect to the brine coils being approximately 40 feet high and stated that during the operation of these coils the lower portion of the coils were wet. How high were the coils wet during those [777] operations?

A. Sometimes the lower coil showed a slight frost, but most of the time they were wet and the water—

XQ106. How high up were they wet?

A. They would go up sometimes two-thirds of the way up.

XQ107. Two-thirds of the way up?

A. Yes, on a real hot day when the plant was overloaded.

XQ108. How high were they generally wet?

A. Generally they were wet one-third of the way up.

XQ109. One-third of the way up? A. Yes.

XQ110. And by "wet," you mean that water was running off from the coils? A. That is right.

XQ111. And what was this temperature of the brine, what do you state was the temperature of the brine in these coils at the lower portion thereof?

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A. Well, that was the return brine, the same as is shown in some of these records. I don't know. That is not available. You are referring to South Works now?

XQ112. Yes.

A. That return brine would run around 34, 35, 36 degrees.

XQ113. That was the general practice to keep it 34, 35 or 36 degrees at the return?

A. About that. Of course, it varied. [778]

XQ114. Well, how much did it vary?

A. Oh, it would probably go up as high as 40.

XQ115. And how low would it go?

A. It would go down to probably 30, or 29 or 28.

XQ116. Not below that?

A. Very seldom below that.

XQ117. You remember that by observation and actual taking of this temperature, do you?

A. Both by observation and by taking the temperature. You could go underneath there. Most of the time the coils were dripping. Sometimes they were frosted all the way to the bottom, but most of the time they were dripping on the bottom.

XQ118. How many of these coils were there?

A. In each compartment?

XQ119. Yes.

A. Well, each compartment was ten coils wide, ten pipes wire, and 102 pipes high.

XQ120. And how much was the distance between the coils?

A. That sheet shows return brine. They were, I would say, 6-inch sections, 5 or 6 inch.

(Deposition of Alfred E. Mueller)

XQ121. And the size of the pipe?

A. 2-inch pipe.

XQ122. You mean then that they would be spaced on the outside approximately 3 inches? [779]

A. Between pipes.

XQ123. Between pipes?

A. Yes. It was probably a little less than that, it was probably $2\frac{1}{2}$ inches.

XQ124. And there were how many of these pipes in each section? A. For height?

XQ125. No, in a horizontal plane.

A. In a horizontal plane there were ten.

XQ126. Ten? A. Yes.

XQ127. And how large was this room?

A. They were 8 feet minus the wall. There was about a 4-inch wall and a line from the column. A little over 7 feet.

XQ128. And this was in the South Chicago plant?

A. Yes.

XQ129. And did these brine coils substantially fill this chamber or room within a few inches of the wall?

A. Within 2 inches.

XQ130. On all sides?

A. On all sides, that is, the two vertical sides, not on the ends. On the ends there were walk-ways probably 3 feet wide, and then the ends of the coils, they had a canvas curtain dropping down from floor to floor to keep the air [780] from by-passing through these walk-ways and make the air go through the coils, canvas curtains at the ends of the pipes.

(Deposition of Alfred E. Mueller)

XQ131. Were these canvas curtains left in position when you state the water was poured over these brine coils?

A. Oh, yes. In fact, most of the time those curtains were frozen onto the return bends.

XQ132. All the way?

A. All the way except probably the bottom ones. If the bottom ones were melted or dripping they were not frozen.

XQ133. Now, you have stated the operation, I believe, that you performed in eliminating the frost from these brine coils. Isn't it a fact that the temperature in that compartment rose above freezing due to the period of time which elapsed between the operations of shutting off the different valves, draining the brine out, and performing the other operations before the water was turned on?

A. Oh, no.

XQ134. Did you ever measure that temperature?

A. No, we never measured the temperature.

XQ135. How long was it between the time that the brine circulation was stopped before the water was turned on?

A. Oh, about 40 minutes, something like that, three-quarters of an hour.

XQ136. Well, it was the practice and it did happen that during this time, this three-quarters of an hour, the cooling [781] effect was eliminated from the chamber, and the temperature of that chamber raised, didn't it?

A. Not necessarily. It still had ice-covered coils in there.

(Deposition of Alfred E. Mueller)

XQ137. But still there was nothing to cool it, was there, when you took the brine out?

A. Neither was there anything to warm it.

XQ138. Was it a fact that air could enter that chamber? A. No.

XQ139. It was impossible for any air to get into it?

A. The air was shut off bottom and top. The air in there was stagnant. It was not circulating. It would not hold a vacuum, but there was no circulation of the air.

XQ140. And how airtight was the top valve?

A. Drip tight. They would not leak water. Those were a shutter. Our biggest trouble was freezing tight. They were always too tight. They would freeze shut and we could not move them. We were always kicking about that.

XQ141. Did you ever observe during the period of time that the freezing operation was stopped, or the brine was shut off and the time that the water was turned on, how much higher on the coils the coils began to sweat and were wet before the water was turned on?

A. Those coils—

XQ142. Just answer the question, please. Did you ever [782] make an observation of that? A. No.

XQ143. You have no idea how much higher then in the compartment the coils were wet after you discontinued the brine circulation and before the water was turned on?

A. Those coils would never thaw out. They would not thaw out in six months if you would not put water on them.

XQ144. Just answer the question, please.

A. Will you state it once more?

(Deposition of Alfred E. Mueller)

XQ145. I ask you, then how much higher the pipes would sweat and would be wet after you turned off the brine and the interval of 45 minutes before you turned on the water.

A. Well, I would not know. I never looked at that.

XQ146. Then you turned on this water for the period you state of an hour and a half to two hours to thaw the coils, to run water over the coils, is that correct?

A. Normally.

XQ147. And it took a period of somewhere between an hour and a half and two hours to complete that removal, is that correct?

A. Normally, but there were exceptions.

XQ148. And the total time that was required to complete the operation and put the air-cooling system back into operation you have stated was a period of from three to five hours, is that correct? [783]

A. Yes.

XQ149. And it was most nearly always a period of approximately five hours, was it not?

A. No. Mostly it was around 3½ hours, I would say.

XQ150. Now, after the water had run over the coils for a period of about an hour and a half, wasn't it your practice to shut off the water and to then open the air valves at the bottom of the tunnel?

A. No, I did not.

XQ151. You never did that?

A. I never did that.

XQ152. At the South Chicago plant?

A. I never did it.

(Deposition of Alfred E. Mueller)

XQ153. You never tried to dry the coils before you turned on the brine again?

A. They would not dry. It would be impossible to dry them. All you could expect was to have them drip off. We waited for the water on it to drip off. After all, it had to drip down 45 feet and it took some time.

XQ154. And how long did that operation take?

A. We usually waited about fifteen minutes for that.

XQ155. During that time, were the valves both above and below closed? A. Yes.

XQ156. You never saw them open? [784]

A. I never did.

XQ157. You never saw them open, either of them, during that period of time? A. No.

XQ158. Now, then, you state that the average times were approximately 45 minutes before you turned the water on, an hour and a half to two hours to let the water remain on, a period of 15 minutes to allow the coils to drain? A. Yes.

XQ159. Then a period of half an hour to three-quarters of an hour to get the brine back in the pipes?

A. Yes.

XQ160. And then how long was it before you opened the air valves, inlet and outlet?

XQ161. Another half h
A. Probably another half hour. A. Yes.

XQ162. Is that substantially the same operation that was performed at the Mayville plant?

A. The same operation?

XQ163. The same operation.

A. Yes, except that at Mayville we had to use somewhat colder water.

(Deposition of Alfred E. Mueller)

XQ164. And it took longer?

A. It took a little longer. [785]

XQ165. How much longer?

A. I thawed a compartment for 11 or 12 hours.

XQ166. You thawed a compartment for 11 or 12 hours? A. Eleven or twelve hours.

XQ167. And what was the temperature conditions at that time?

A. That would be when the water in the river would be probably around 40 degrees. That was the water we were using for thawing.

XQ168. What time of year was that operation?

A. That would be November or December, cold weather, or early in the spring.

XQ169. Do you remember any particular time when any such operations required eleven to twelve hours?

A. Well, I remember several times. You see, at the South Works that first winter we only ran a few short times, and I would not know much about it, I have not any records to prove it, but in the Mayville plant we ran that plant very late in the fall and started it early in the spring pretty nearly every year.

XQ170. What do you mean by "very late in the fall"?

A. Well, as I said, the temperature conditions at that time, they would be down to below freezing at night time and maybe as high as 40 above in the daytime.

XQ171. Did you run the plant at night time when it was [786] below freezing? A. Oh, yes.

XQ172. And you ran it 24 hours a day under those conditions? A. Yes.

XQ173. And the temperature of the air coming into the compartment then at some of those times was materially below freezing, is that correct? A. Yes.

(Deposition of Alfred E. Mueller)

XQ174. How low?

A. Well, I would say maybe 25 degrees, not 25 degrees below freezing, but 7 degrees below freezing or 25 degrees above, Fahrenheit.

XQ175. And how much water did you remove from that air?

A. Then we had the moisture down to less than one grain per cubic foot.

XQ176. How much did you remove from it? Didn't it come in at that figure less than one grain per cubic foot?

A. I don't remember the psychrometric table except at one temperature, and that is at 32 degrees. When the air temperature is 32 degrees and it is saturated with moisture it contains 2.11 grains per cubic foot.

XQ177. Did you ever operate any of these compartments where you had 100 outside air humidity?

A. Yes. [787]

XQ178. When?

A. On a real foggy day. When it was not only foggy but when the fog, that is, the air temperature was dropping.

XQ179. Do you remember any time in November or December or early in the spring when you had any such condition? A. Oh, no.

XQ180. As a matter of fact, outside air temperature of the character of which you are just speaking of 25 degrees you don't have any condition of relative humidity which approaches 100 per cent, do you?

A. Just a minute before we got into an argument there. At Mayville we often ran the dry blast plant when we knew we were not taking out any moisture but we were

(Deposition of Alfred E. Mueller)

maintaining constant conditions at the furnaces. In other words, sometimes instead of letting the moisture in the air go up and down we held it uniform.

XQ181. Sometimes you put moisture back in the air?

A. Sometimes we put moisture back in the air. Of course, that was uneconomical and we did not do it very long. As soon as we thought that was going to continue any length of time we shut the plant down.

XQ182. Well, if you did under conditions of 25 degrees outside temperature operate this plant, it was not for the purpose of removing moisture, was it?

A. No. [788]

XQ183. And the actual result would have been in this kind of an operation to put moisture back into the air, wouldn't it?

A. It probably would; yes.

XQ184. Now, in this report, Plaintiff's Exhibit 33, is it not true that these temperatures in the columns under the heading "Outlet" under "Psychrometer," are discharge air temperatures, both wet and dry bulbs? A. Yes.

XQ185. And it was from those temperatures and the use of this chart that you were enabled, together with the inlet temperature under the heading "Psychrometer" to determine the relative drop in humidity of the air cooled, is that not true? A. Yes.

XQ186. And the discharge temperatures were of the air in the tunnel leaving the cooling building, were they not? A. Pardon?

XQ187. And these outlet temperatures, both wet and dry bulbs, were the temperatures of the air in the tunnel leaving the refrigerator room, were they not?

A. That was not a tunnel. That was a steel pipe on top of the refrigerator.

(Deposition of Alfred E. Mueller)

XQ188. Those were the temperatures in that pipe?

A. In that pipe, yes. That is, these temperatures shown here are not the temperatures of the air taken out of [789] that pipe. In taking the samples of air out of this pipe and bringing it down to where we took our readings it warmed up and we took these temperatures from the warmed-up air.

XQ189. How far did that air travel?

A. That traveled, oh, I would say, 150 feet.

XQ190. And in what size pipe?

A. 2-inch pipe. 2 or 2½-inch. I am not too sure of that.

XQ191. Under what velocity?

A. Well, we had a 2-ounce pressure there. Maybe 10 feet per second, something like that.

XQ192. And that temperature was measured at the bottom by passing that air over the wet and dry bulbs of the psychrometer, is that correct?

A. Yes.

XQ193. Have you any figures which show the temperature of the air in that steel collector pipe at the top of the cooling room?

A. Oh, yes. That whole column of figures—wait a minute. What are we referring to?

Mr. Neave: Plaintiff's Exhibit 33.

The Witness: That is in the fourth column.

Mr. Lyon: XQ194. Those are the temperatures of the air as it actually existed in that tunnel, are they?

A. In that steel pipe.

XQ195. In the steel pipe. [790]

A. Yes.

(Deposition of Alfred E. Mueller)

XQ196. Where?

A. Those temperatures were taken way at the end of the last compartment, the fourth compartment—the seventh compartment, way at the end, just as the air left the—wait a minute. How am I going to say that? At the farther end of the refrigerator building, not at the inlet end but at the outlet end of the building.

XQ197. Those temperatures were taken in the steel pipe, and that steel pipe in that 8-foot pipe after it had collected air from all of the compartments that were operating, is that correct? A. That is right; yes.

XQ198. At a point beyond the top of the refrigerator room? A. Yes.

XQ199. How far beyond? A. Oh, ten feet.

XQ200. Where was the point of taking, with respect to that temperature, taking the air, at which these psychrometer readings were taken?

A. Approximately the same place. Inside of this 8-foot diameter pipe we had a funnel probably a foot in diameter, maybe two or three feet long, and this funnel tapered down to a 3-inch pipe, and then led out through the wall of [791] this 8-foot pipe and down back into the fan room. That, as I say, was about 150 or 200 feet of 2-inch pipe which it took to bring it down there.

XQ201. And did that pipe pass through the outdoors, through which the air was conducted?

A. It passed outside of the building all the way down.

XQ202. All the way?

A. Yes. On a hot summer day when the sun would be beating on there, that temperature went up considerably high. You can see some of the—well, that is not in the record.

(Deposition of Alfred E. Mueller)

XQ203. How high did it go?

A. I see some records here of 106 degrees.

XQ204. Where the wet and dry bulb psychrometer temperatures went up to 106 degrees?

A. Where the dry bulb went up to 106 degrees and the other to 62½. This is at Northwestern. I have not any figures on South Works.

XQ205. You stated on direct examination that you were given a figure at South Chicago plant of the number of grains of moisture per cubic foot of air which you should operate at. What was that figure?

A. Well, that was never constant. Most of the time it was around 2 grains, 1.8 grains, 1½ grains.

XQ206. And did it go above 2 grains?

A. Not officially. [792]

XQ207. How often did it go above 2 grains?

A. When the weather was very, very warm and we had a normal load on. You see that South Works plant was designed for two furnaces, and they put on three furnaces, and sometimes four and sometimes five funaces, and the converters. It was designed for, I think, 70,000 cubic feet per minute, and we were at times handling over 140,000 cubic feet per minute, and that so overloaded the plant that it was impossible for us to keep the moisture down below 2 grains. Sometimes it did get above 2 grains of moisture, and as I say not always officially.

XQ208. Now, are the operations that you have stated with respect to the South Chicago plant substantially the same operations as were performed at the Mayville plant?

A. Yes, except that in Mayville the conditions were not quite so severe. We made a better showing. We did better work in Mayville.

(Deposition of Alfred E. Mueller)

XQ209. You mean you did not run into so many of these types of conditions where you could not get down to 2 grains per minute? A. That is right.

XQ210. I mean 2 grains per cubic foot. You did not run so often into that type of conditions?

A. That is right.

XQ211. But other than that the operations were the same? [793] A. Yes.

XQ212. Now, you have referred to Plaintiff's Exhibit 8, a copy of which has been offered as Plaintiff's Exhibit 37. Before this proceeding when did you last see those drawings, that is, both 37 and 8?

A. I don't remember ever having seen them.

XQ213. You don't remember ever seeing it?

A. Not until this morning; no, sir.

XQ214. When did you see it this morning?

A. About 10:00 o'clock.

XQ215. That is, before you were called to the stand?

A. Yes.

XQ216. You never saw it before? A. No.

XQ217. You never made a comparison of anything that is shown by this drawing with either of the plants which you say you operated?

A. Of this drawing, no.

XQ218. As far as this drawing shows the construction, however, you are certain that it is an accurate representation of that construction, are you?

A. I have not found any differences. So far as my recollection goes, everything is just the way it was. I won't swear to the dimensions to the inch or so, but outside of that the arrangement and everything else is correct. [794]

(Deposition of Alfred E. Mueller)

XQ219. The arrangement, direction, travel and so forth of all the pipes is correctly shown, is it?

A. That is right.

Mr. Lyon: That is all.

Mr. O'Hearn, Jr.: That is all, Mr. Mueller.

The Court: How many depositions did we get under our belt today?

Mr. Neave: We finished the depositions of the Chicago and Northwestern and I will now offer Exhibits 7 and 8—

The Court: And Indianapolis.

Mr. Neave: And Indianapolis; yes: I want to offer these exhibits, Nos. 7 and 8, and 30 through 37.

Mr. Lewis Lyon: Your Honor, I would object to the offer of those Exhibits 30 to 37, those pieces of paper that were taken out of the wastepaper basket, as not connected up with anything. Nobody knows who took them, whether they were discarded records or what they were, and there is no evidence at all to connect them with any officials of any company.

The Court: I am afraid there isn't counsel. I was thinking about that. As long as there might be an inference that might be drawn, the inference from the wastebasket might be that it is no good.

Mr. Neave: Let us take up the exhibits individually.

The Court: I think all the others are admissible. [795]

Mr. Lewis Lyon: All the others are admissible except those taken from the wastebasket. I am not objecting to them.

The Court: They have been identified by handwriting, and so forth.

Mr. Neave: Just a minute, your Honor. Let us take up Exhibit 32.

The Court: Exhibit 32 is the only group of exhibits which have not been identified as being definitely the records or coming from the regular records of any company and concerning which the witness testified he practically took them from the wastebasket.

Mr. Neave: Let me speak to that, may I, your Honor? This witness who produced those testified that his duty—may I just read a portion of it on page 44?

“Q27. Mr. Gaide, what were your duties as assistant supervisor of the dry blast plant?

“A. Well, I saw that the readings were taken.

“Q28. Which readings are you referring to?

“A. The temperature readings and the humidity readings. For instance, we had the brine inlet, the brine outlet, the water temperature inlet, the condenser and the water temperature outlet, the atmosphere temperature outside, the air temperature entering the refrigerating rooms — compartments, rather. And we took humidity readings, dry and wet-bulb readings of the air entering the compartments and the air [796] temperature leaving the compartments, and the humidity readings of that air.

“Q29. Whose business was it to take these readings?

“A. We had a regular temperature man.

Q30. A temperature man?

“A. We called him a temperature man.

“Q31. And what did they do with these temperatures after they took them?

"A. That was entered on a big sheet, a daily report sheet after they scribbled it off on scratch paper, what I call it, lined paper.

"Q32. And then they transferred these figures from the scratch paper, as you call it—

"A. To daily report sheets.

"Q33. And where did those daily report sheets go?

"A. Well, off the original they made several blueprint copies that were scattered around through different departments throughout the plant. I don't know just who got them.

"Q34. Did your office get any?

"A. Yes.

"Q35. Were you familiar with these temperature readings?

"A. Well, pretty much so. I should be."

Then I asked him what the temperatures were.

Now it appears that the company records, as stipulated to, are no longer in existence. That has been stipulated to. [797] These records that this man identified were the records that were made by the temperature men.

The Court: I think you are right. Objection overruled. They are admitted.

Mr. Lewis Lyon: Not as to 32. He never testified that he took 32 at all.

The Court: He didn't testify he took 32 but he testified the records of the company were destroyed, that records were kept similar to these that were passed around, and he saw them, and he recognized them, he said they were being thrown away and he saved them. It goes to the weight of the evidence rather than its admissibility; secondary evidence.

(The documents referred to were received in evidence and marked Plaintiff's Exhibit 7, 8, 30, 31, 32, 33, 34, 35, 36 and 37 respectively in evidence.)

[Note: Plaintiff's Exhibits Nos. 7, 30 to 37 will be found in the Book of Exhibits at pages 1125, 1152 to 1205.]

The Court: I still would like to get straightened out in my mind this psychrometer reading. Where is the inlet thermometer posted? Is there any evidence on that?

Mr. Lyon: No.

Mr. Neave: First of all, which operation are you talking about?

The Court: Under "psychrometer" it says "inlet dry-wet," "outlet, dry-wet"—all those are temperature readings. Where were the wet and dry thermometers that took those readings? Is there any evidence on that? [798]

Mr. Neave: I believe there is but I don't know which exhibit you are looking at, your Honor.

The Court: 32, 33, 34, 35, 36—all of them have that same heading. And this witness—you read from page 135—he described how the air was taken from the middle or some place in the big 8-foot tunnel through a pipe down into the boiler room, but no one said where the thermometer is put.

Mr. Neave: I think that with respect to Mayville, which is not Exhibit 32 but it is the other one, with respect to Mayville the temperature of the outgoing air of the top of the coil, the cold air, was in this 8-foot pipe, and the thermometer was placed in that 8-foot pipe. That is the temperature reading in the column that says "top of coil."

The Court: That is your position?

Mr. Neave: That is our position from the testimony.

The Court: What I want to get at is where is there any evidence—I am a column ahead of you. I am up to No. 5 and you are still back on No. 4. Under 5 and 6—do you have the exhibit there?

Mr. Neave: Exhibit 33?

The Court: Yes, 33 is a good example. The form is all the same. It says “air psychrometer.” Now “psychrometer” is divided into four columns. Do you have that?

Mr. Neave: Yes, your Honor.

The Court: And subdivided into two columns which in [799] turn are divided in one, “dry-wet, dry-wet.”

Now where is the testimony about where the thermometer was placed, the wet and dry thermometer, on the inlet?

Mr. Neave: On the inlet side? I will see if I can find out.

The Court: You do not need to look for it now. That might be something you could supply over the weekend.

Also where is the testimony that says where the thermometer was on the outlet dry and wet? I do not mean where the air went, but where was the thermometer?

Mr. Neave: We will find that and give it to you also.

Mr. O'Hearn: That is on page 97, your Honor.

The Court: Let me see it.

(The document referred to was passed to the court.)

The Court: It says it ran over two thermometers, that it was dried in the refrigerating building and a sample of that air was drawn down through a pipe, back into the inlet of the fan, and on its course down to this fan it ran

over two thermometers. Now if it was at the end or the beginning, that would make a difference because that witness has testified that the temperature outside in July was 106.

Mr. Neave: We will get that testimony for you.

The Court: All right. I guess we will have to recess until Tuesday morning at 10:00 o'clock.

Mr. Lewis Lyon: Your Honor asked one question about Mr. [800] Payne. I have ascertained it. I can bring Mr. Payne back from Santa Rosa, if your Honor asks us to do it.

The Court: I do not think it would be necessary to bring him down all the way from Santa Rosa. You know the question I had in mind, and it may be that you can ask him, or counsel can telephone him and ask him, what he would testify to if he were brought back.

Mr. Lewis Lyon: What was the question?

The Court: How long it took manually to clean out by the chipping or chopping method, whatever method they used in the other storerooms, that were the same size as the room in which he installed the Recold system.

Mr. Lewis Lyon: I will ask him.

The Court: Will that be agreeable?

Mr. Neave: That is entirely agreeable to me.

Mr. Lewis Lyon: I will do that.

The Court: Very well.

(Whereupon, at 4:40 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Tuesday, September 24, 1946.) [801]

Los Angeles, California, September 24, 1946, 10:00 o'clock A. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor.

(Interruption for other court matters.)

The Clerk: York Corporation v. Refrigeration Engineering, Inc., for further trial.

Mr. Lewis Lyon: Your Honor, I have communicated by telephone with Mr. James R. Payne, the witness who was on the stand in reference to the Haslett Warehouse job. In answer to the court's question as to how long it took manually to clean out by the chipping or chopping method, whatever method they used in the other store-rooms, that were the same size as the room in which he installed the Recold system.

The Court: You are now reading—

Mr. Lewis Lyon: From your statement.

The Court: —from my statement of last Friday evening?

Mr. Lewis Lyon: Yes; on page 801 of the record.

In answer to that question, Mr. Payne stated to me that the time that it would take would be 144 man hours or, stated another way, two men working three shifts a day for three days.

The Court: Do you stipulate that if Mr. Payne were recalled to the witness stand and asked that question he would so testify? [806]

Mr. Neave: Yes, your Honor.

The Court: Very well. That is 144 man hours or two men working three shifts for three days?

Mr. Lewis Lyon: Yes.

The Court: What page were you reading from?

Mr. Lewis Lyon: 801, your Honor; line 9.

The Court: Very well.

Mr. O'Hearn: Your Honor asked some questions last Friday I believe about the temperature charts that were in evidence in the Chicago depositions, and I would like to point out some places in the record that I think clear up those questions that you asked.

The Court: Very well.

Mr. O'Hearn: First in regard to the inlet air temperature or atmospheric temperature, Tominac said—and I am going to refer, your Honor, to the record pages since the deposition has now been copied into the record.

The Court: Yes.

Mr. O'Hearn: Page 666, starting at line 19. This is not in relation to any exhibit, your Honor, because none of the temperature charts had gone in at this time, but this is generally in relation to the air temperature.

“Q. And can you point out where those readings were taken?

“A. Inlet air temperature was taken down by the air [807] going into the compartment by shutters in the tunnel, while the air was going into the compartment, the inlet air, and the outlet temperature was taken on the top floor.” [808]

Then Gaide, the second witness in reference to the first page of Exhibit 32, which was that list of 39 pages of temperature charts, stated at page 693—

The Court: Let me see. Now, he said the inlet temperature was taken at the shutters going into the tunnel and the outlet temperature was taken on the top floor.

Mr. O'Hearn: Yes, your Honor. I was going to come to those outlet temperatures separately.

The Court: Oh, very well.

Mr. O'Hearn: Then in reference to the first page of Exhibit 32, the witness Gaide said at page 693, beginning at line 17, in answer to a question, and this is at line 9:

"Q. Now, what do the entries in the column marked 'Temperature Atmosphere' refer to?"

"A. That is the outside air."

And another answer:

"A. That was the outside temperature."

"Q. Of the air?"

"A. Of the air."

Then in reference to Exhibit 33, which was the one page of temperatures that the witness Mueller presented, he said at page 739 of the record, starting at line 10.

"Q. Starting at the left side of the chart, we have the first column which is the 'Time' and then we have the second column, 'Weather Conditions.' Then, [809] we come to the third column headed 'Temperature' and the sub-heading 'Atmosphere.' Will you explain what the figures in that third column represent?"

"A. The column 'Atmosphere Temperature,' that shows us the temperature of the outside air as it entered the fan before it entered the refrigerator building. That is the outside temperature."

Then, your Honor, in reference to the temperatures top of coils, or the outlet temperatures from the compartment, the witness Tominac said at page 666, line 23, which was the part that your Honor read, in finishing up that answer before:

"A. * * * and the outlet temperature was taken on the top floor.

"Q. Where on the top floor?

"A. Right in each individual compartment.

"Q. Where in each individual compartment?

"A. Right where they come in. There was a door to each compartment.

"Q. You mean a door leading into each compartment?

"A. Yes.

"Q. And that is where the temperature was taken?

"A. Yes, sir.

"Q. Was the temperature taken at any other place?

"A. Well, we would take it once in a while down there at the first floor,—the second floor, but most [810] of the time the outlet temperature was taken right on the top, right above the coils.

"Q. Taken above the coils?

"A. Above the coils because your outlet was above the coils.

"Q. How far above the coils?

"A. About six feet above the coils.

"Q. Above the coils?

"A. Above the coils."

The Court: Let me see if I can understand the general situation here. Where did the witness testify they got into these rooms (indicating model), from this side?

Mr. O'Hearn: Yes, your Honor.

The Court: They came in this way?

Mr. O'Hearn: They came in this way, and there were doors here (indicating), and platforms.

The Court: And platforms. So this would be the top floor, and there was a door going into each one of these?

Mr. O'Hearn: That's right, from a passageway.

The Court: From a passageway. Therefore, this outlet temperature was taken here (indicating).

Mr. O'Hearn: From the top floor, above the coils.

The Court: And the inlet temperature was taken at the bottom?

Mr. O'Hearn: That's right, your Honor; the outside air [811] temperature or inlet.

The Court: There are three temperatures. There is the outside air temperature, which was taken in the tunnel of the other building before it came in.

Mr. O'Hearn: The fan was right beside it.

The Court: There was a little building here, and a fan there, and the outside temperature was taken there?

Mr. O'Hearn: Yes.

The Court: It went through the fan and was taken there, the inlet temperature?

Mr. O'Hearn: I think those are the same temperatures. The fan was just at the entrance to the tunnel leading into the compartments.

The Court: He said these were taken at the shutters leading into the tunnel.

Mr. O'Hearn: You see, there was a fan and the shutters into the building, leading into the tunnel below the building.

The Court: All right. In other words, the inlet temperature was taken before it got into these chambers?

Mr. O'Hearn: That is right.

The Court: And the outlet was taken at the upper part of the chamber?

Mr. O'Hearn: Right above the coils.

The Court: Right above the coils.

Mr. O'Hearn: In fact, I believe the testimony shows they [812] occasionally walked upon the top of the coils. The witness Harkins stated they went above the coils to take the temperature.

The Court: All right.

Mr. O'Hearn: Then the witness Gaide said, in reference to the first page of Exhibit 32, at page 693, line 20:

"Q. And in the second column is the heading 'Top of Coil.' What do the entries under that column mean?

"A. That was the temperature of the air about to leave the dry blast plant refrigerating coils.

"Q. Where was that temperature taken?

"A. On top of the coils."

Then the witness Mueller, in reference to his one-page exhibit, Exhibit No. 33, said at page 739, starting at line 20:

"Q. The fourth column from the left is headed 'Top of Coil.' Would you give us what the figures in that column represent?

"A. We had two thermometers on top of the coil, one was an ordinary mercury thermometer and the other was a liquid thermometer. Which one of these it was, I don't know, but I think this was an ordinary mercury thermometer that was inserted in this 8-foot steel pipe on top of the refrigerator building, and that temperature was read hourly by the record man, and that is reported [813] in the fourth column."

The Court: That does not seem to jibe with the other witness.

Mr. Lewis Lyon: No.

Mr. O'Hearn: Well, your Honor, I believe they mean by the 8-foot pipe this tube up here (indicating).

The Court: Yes.

Mr. O'Hearn: Now, the air right above the coils would be, as I conceive it, the same as the temperature in that 8-foot pipe, whether the temperature was taken 6 feet or 10 feet above.

The Court: Let me see the exhibit. Have you got it? Here it is, right here. Exhibit No. 33, wasn't it?

Mr. O'Hearn: Yes, your Honor, that is this one.

The Court: Yes.

Mr. O'Hearn: In the fourth column.

The Court: All right.

Mr. O'Hearn: In reference to Exhibit No. 34, which was one of the temperature charts that Mueller presented from Mayville,—

The Court: From Mayville, yes.

Mr. O'Hearn: Mueller said at page 764, starting at line 1:

"Q. On Plaintiff's Exhibit 34, for identification, what are the figures represented in the third column from the left? [814]

"A. Those were the temperatures taken at the top of the coil, that is, they were the temperature of the air leaving the refrigerator.

"Q. Are all the temperatures shown there shown to be below freezing?

"A. They are all several degrees below freezing."

Then continuing right on in reference to Exhibit No. 35, which is another temperature chart from Mayville.

"Q. I show you Plaintiff's Exhibit 35, and ask you what are the figures represented in the third column from the left in that exhibit.

“A. Those are also showing the temperature of the air leaving the refrigerator, the top coils of the refrigerator.

“Q. And are all of those temperatures below freezing?

“A. All of those temperatures are below freezing several degrees.” [815]

The Court: If I understand this correctly, then the top of coil as distinguished from the outlet, the coil is here and the outlet is here (indicating)?

Mr. O’Hearn: You mean outlet dry and outlet wet?

The Court: Yes, outlet dry-wet.

Mr. O’Hearn: I was just about to go to that outlet wet, and dry psychrometer readings, your Honor.

Plaintiff will show by further testimony that the number of grains of moisture per cubic foot, or the humidity readings, are determined by taking readings on a psychrometer and a psychrometer is an instrument which has two mercury thermometers, one an ordinary thermometer and the other with a piece of wet muslin wrapped around it. In order to get a proper reading there must be a known velocity of air passing over the thermometer. There are two ways of doing this, either you tie them on the end of a piece of string and you swing them in the air or you can take the two thermometers and you can place them in a pipe in which air is rushing by. Either way gives you the same result.

We also will show by further testimony that it is the difference between the two temperatures that is the important thing rather than the temperature at which the air was taken. In other words, if you have air at a certain temperature and then raise the temperature of that air you have not added to the moisture content of that air in any way. [816]

In other words, it will give you the same result by reference to a psychrometer table whether the temperature of the air was down around 30 or whether the temperature was up around 80, so long as both wet and dry temperatures were taken at the same time.

The Court: That is what they were concerned with, was the moisture content?

Mr. O'Hearn: That is right.

The Court: You are not here concerned with that?

Mr. O'Hearn: No, your Honor; we are not concerned with it.

The Court: We are concerned with the temperature only?

Mr. O'Hearn: The temperature only. But I think the question came up, your Honor, because you thought that the dry outlet temperature should correspond to the top of the coil temperature. If the dry bulb temperature were taken at the outlet, in other words, above the coil, then—

The Court: I think I understand where the top of coil is now. The top of coil is in here (indicating).

Mr. O'Hearn: That is right.

The Court: Whereas the outlet temperature was in here (indicating)?

Mr. O'Hearn: Yes.

The Court: It is in two different places. I understood the testimony to be, when we were discussing it the other [817] day, that the thermometers in two different places read the same.

Mr. O'Hearn: Yes, your Honor.

The Court: And it doesn't, according to this testimony now.

Mr. O'Hearn: The outlet dry temperature, although we noticed the dry went up as high as 106, and—

The Court: Where was that taken now?

Mr. O'Hearn: That was taken in that tube, that 8-foot pipe over the top of the coils. There was a funnel and from the funnel a 2-inch pipe extended outside the 8-foot pipe.

The Court: Where was the thermometer?

Mr. O'Hearn: Down in the engine room.

The Court: Where is the testimony that shows that?

Mr. O'Hearn: The testimony of Mr. Mueller at page 740, your Honor, starting at line 19.

"Q. Then, in the seventh and eighth columns we have the headings 'Psychrometer Outlet Dry' and 'Wet'. Could you tell what the figures under those columns represent?

"A. The air that was dried in the refrigerator building, a sample of that air was drawn down through a pipe, back into the inlet of the fan, and on its course down to this fan it ran over two thermometers, one a wet-bulb thermometer and the other a dry-bulb. By the difference between these two thermometers we got the moisture in the air after it had gone [818] through the refrigerator building."

I was in error, your Honor, in stating it was in the engine room. It is in the fan room that the two-inch pipe led.

The Court: But we still don't know where the thermometer was. He says on its course down. Now that might have been any place.

Mr. O'Hearn: It doesn't matter where it was, your Honor. It could have been in any part of that pipe as long as both thermometers were at the same place in that pipe.

The Court: All right.

Mr. O'Hearn: It could have been up at the top.

The Court: What I am trying to find out is what the temperature was in this thing here that came out (indicating).

Mr. Neave: That is the top of the coil temperature.

Mr. O'Hearn: That is the top of the coil temperature.

The Court: But it was 6 feet from here up to there (indicating).

Mr. Neave: Yes.

The Court: All right.

Mr. O'Hearn: Your Honor also asked a question about how the brine was cooled in order to use it as a refrigerant.

The Court: I think that is clear.

Mr. O'Hearn: Is that clear?

The Court: Yes. [819]

Mr. O'Hearn: All right.

The next depositions we come to, your Honor, are the other depositions that were taken at Elmira, New York. There were four witnesses, your Honor, George A. Per-sonius, who was the photographer, Ralph Van Patten, who installed the two units, Louis V. Smith, who was superintendent of the plant, and W. C. Fuller, who was in charge of the maintenance of the plant.

I would like to offer at this time the direct and redirect testimonies of all four of those witnesses, but I don't think it is necessary to read them into the record now. I would like to summarize them for your Honor.

In July 1935 in Elmira, New York, the Swift Company opened a new plant, and in that plant there were two cooling rooms, one known as the sausage room and one known as the pickle room.

The sausage room was kept at approximately the temperature of 40 degrees and the pickle room was kept at approximately a temperature of 33 to 36 degrees.

The testimony shows, however, that occasionally over weekends both of these units went down below freezing at a time when people were not coming in and out of the room, and this happened particularly in the pickle room, which was the lower of the two temperatures.

To understand the two units, your Honor, there is a [820] schematic drawing, which was marked Exhibit 45, which was identified by both Smith and Fuller as correctly showing the installations. Both units were almost identical, your Honor, except that they were operated in a slightly different way.

Looking at the lower figure on Exhibit 45, it shows the unit with the coils, finned coils, and a spray header which was a 2-inch pipe with small holes drilled in the bottom. Just outside the unit there is on the supply conduit a stop-and-waste valve of the screw cap drain type. That, however, was within the refrigerated space.

Outside the refrigerated space on the supply conduit in both cases there is an ordinary standard valve. The only difference in the operation of the two units was that in the pickle room, where the temperatures were lower, the stop-and-waste valve just outside the unit was always left open, both the valve and the waste feature of the valve.

In other words, the little screw cap drain was always left open. The water was controlled entirely from outside the room. In order to defrost the valve outside the room was opened and water spurted over the coils as shown in the photograph, Exhibit 40, which shows the coils and the spray header with the water spurting out.

After the water had removed the frost from the coils, the control valve outside the room was turned off and by means of the little vent or screw cap drain the supply conduit [821] was vented and the water drained out of the spray header.

In the sausage room, which is shown on Plaintiff's Exhibit 42 with the spray header in operation, it was operated by the control valve just outside the unit. A picture of that valve is shown in Plaintiff's Exhibit 41, a photograph.

When the frost had been removed from the coils the valve was shut off and the screw cap drain, which is shown hanging down below the valve was opened, thus venting the line to the atmosphere and allowing the water which was in the pipe and spray header to drain out.

At this time I also want to offer the Exhibits Nos. 38 through 45 that went with these depositions.

The Clerk: May I have the names of those depositions? Do we have them on file?

Mr. O'Hearn: Yes, I believe so.

The Clerk: Don't bother then.

The Court: The names again were?

Mr. O'Hearn: Louis V. Smith, who was the plant manager, and then there was W. C. Fuller, who was the maintenance man, and there was Ralph Van Patten, who was the plumber who installed both units, and then George A. Personius, who was the photographer that took those photographs.

The Clerk: Yes, I have it.

The Court: You offer in evidence all exhibits, 38 through 45? [822]

Mr. O'Hearn: Yes, your Honor.

The Court: What is this telegram here, Exhibit 44?

Mr. O'Hearn: I think that was put in for two reasons, one to prove the date and also to prove that it was a water defrosting unit.

The Court: All right. You offer them in evidence?

Mr. O'Hearn: Yes, your Honor.

The Court: Any objection?

Mr. Lewis Lyon: No objection.

The Court: Admitted.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits Nos. 38 to 45 inclusive.)

[Note: Plaintiff's Exhibits Nos. 38 to 45 will be found in the Book of Exhibits at pages 1206 to 1214.]

Mr. Lewis Lyon: I will offer the cross examination and recross examination of the respective witnesses who were cross examined, including Louis V. Smith, W. C. Fuller; Louis V. Smith was recalled and recrossed, as well as the cross and recross of the witness Ralph Van Patten.

There are several observations which I believe I would like to make at this time. First, as stated by Mr. O'Hearn, the testimony of the witnesses that both of these rooms were above freezing rooms. They were so operated.

Another very important factor on cross examination shows that in the same Swift plant they had a freezing room which they didn't use this system of defrosting in, but they used [823] the old pipe system and had to take all the meat out of the freezing room and defrost it by other means each time they were required to defrost.

The Court: That is a below freezing room?

Mr. Lewis Lyon: It was right next door to this room. They didn't use water defrosting in that room but they used an older system which required them to take all the meat out of the room and defrost, let the temperature come up, and put the meat back.

Further than that, there is no testimony here of any of these witnesses as to the condition of the so-called de-

frosting rooms or apparatus at any time except at the time the testimony was taken. There is no witness that testifies that condition there was at the time of installation. It is certainly immaterial as far as this case is concerned what the condition of those particular installations was in February of 1945.

The Court: What does the testimony show as to how they defrosted the third room?

Mr. Lewis Lyon: The cross examination of Mr. Smith, page 30. I will read that, your Honor.

The testimony of that is this way, reading from page 29:

"Q. Mr. Smith, in this same plant you have a below zero freezing room, do you not?"

The Court: That is at the bottom of page 28? [824]

Mr. Lewis Lyon: Yes.

"Q. Mr. Smith, in this same plant you have a below zero freezing room, do you not?"

"A. Yes.

"Q. How could it be kept?"

"A. That depends on what product we have. That is not under my supervision and I don't have any occasion to follow the temperature of that. That is handled by whoever is storing the produce in the house and I can't say accurately what the temperature is at any time.

"Q. You do know it is kept below ten degrees below zero * * * you do know that that room is kept below ten degrees below zero at many times?"

"A. I don't know that.

"Q. You do know that it is kept materially below 30 degrees Fahrenheit, do you not?"

"A. Yes.

“Q. There is a refrigerating coil in that room, too, isn’t there?

“A. Yes.

“Q. It is a fact that meat is stored in that room under these various conditions and that the pipes there do frost up and that in order to defrost those pipes the meat is taken from the room, the pipes are sprayed with water by a hose, allowing the temperature to rise, and before any meat is put [825] back in the room the temperature is reduced. Is that true?

“A. Yes.”

Referring also to the cross examination of Mr. Van Patten and the other witnesses, it shows that in these rooms the pipe inside the unit exploded because it wasn’t properly operated at some time.

The Court: Where is that?

Mr. Lewis Lyon: On cross examination of one of the witnesses it was brought out. I think it was in the cross examination of Mr. Smith again.

Mr. O’Hearn: The direct examination of Fuller, page 41.

Mr. Lewis Lyon: He stated that the pipe had exploded because it had gone down below freezing and the pipe had exploded and when that explosion took place nobody knows. Nobody could testify to that.

The Court: Where are you reading from? Page 41?

Mr. Lewis Lyon: That is on page 41, your Honor. The question was:

“Q. I notice in Plaintiff’s Exhibit 40, apparently a considerable spray of water is shown at the lower left-hand corner of that picture. Can you explain what that is?

"A. We have a short break in the pipe there, approximately one inch long."

That opening was caused by the pipe at some time splitting because it was freezing. Now when that split occurred [826] nobody testified about, but the material point that I want to make there comes in Ralph Van Patten's cross examination, or recross examination and redirect examination, with reference to the so-called stop-and-waste valve that was supposed to have been put in this installation at some time or other.

Mr. Van Patten was the only person who testified who had any knowledge of the conditions that existed, or when this installation was supposed to be made, and he testified that the valve that was put in there was not a stop-and-waste valve but an ordinary gate valve which he identified and produced one from his stock. He testified at the end, on page 55 of the examination, on recross examination:

"Q. Is this an ordinary gate valve?

"A. Yes.

"Q. It is an inch and a quarter standard gate valve?

"A. Yes.

"Q. It has no vent in it, has it?

"A. No." [827]

So the valve that was originally installed was an ordinary gate valve, and not a stop and waste valve, and nobody testified when the stop and waste valve was put in the structure.

The Court: All right.

Mr. Lewis Lyon: I will offer the cross examination of the witnesses.

The Court: Admitted in evidence.

Mr. O'Hearn: The testimony of Ralph Van Patten also shows, your Honor, that none of the pipes or valves had been changed since they were put in.

Mr. Lewis Lyon: No, it does not.

The Court: I see here on page 54:

"A. I take it for granted because they are the same ah we left there.

"Q. Would you know whether they had changed any particular piece of pipe?

"A. I don't imagine they did.

"Q. You don't know whether they changed the slope," and so forth.

Mr. O'Hearn: I believe, your Honor, that on page 51 he testified that he had looked at the installations last Friday morning.

"Q. Did you observe any change in pipes or valves or vents that you recall having installed?

"A. No, I saw no change in them." [828]

Mr. Lewis Lyon: On cross examination, however, he corrects that.

The Court: We can argue that later. They are both in the record.

Mr. O'Hearn: Also, I would like to point out that the testimony as to the other freezing room was not proper cross examination, and it was pointed out at the time that Mr. Lyon was making it.

The Court: I noticed your objection there, but I would overrule it. [829]

District Court of the United States
Southern District of California
Central Division

Civil No. 4166-PH

York Corporation, Plaintiff, vs. Refrigeration Engineering, Inc., Defendant.

Depositions taken on the 19th day of February, 1945, at the City of Elmira, New York, before J. Leslie Winnie, Notary Public.

Appearances:

For the plaintiff:

John B. Cunningham, Esq.,

William J. O'Hearn, Jr., Esq., of counsel.

For the Defendant:

Lewis E. Lyon, Esq.

Appearance noted of Mr. H. T. Jarvis of defendant.

By Mr. Cunningham: Mr. O'Hearn will read the stipulation.

By Mr. Lyon: It may be deemed to be read, and may be copied into the record.

It is stipulated by and between the parties by their counsel:

1. That the hearing today is held pursuant to notices [830] served upon the defendant and now before the Notary, J. Leslie Winnie, (Chemung County Court Stenographer,) Court House, Elmira, New York.

2. That the provision of Rule 26 (a) of the Federal Rules of Civil Procedure that depositions taken prior to service of answer shall be by leave of the Court, is hereby waived.

3. That the witnesses shall be sworn by J. Leslie Winnie, who is fully qualified under the provision of Rule 28, sections (a) and (c) of the aforementioned Rules.

4. That the testimony given here shall be taken stenographically and transcribed by J. Leslie Winnie.

5. That the testimony, when transcribed, shall be submitted to the witness for examination and shall be read to or by him, and any changes in form or substance which the witness desires to make shall be entered upon the deposition by J. Leslie Winnie, with a statement of the reasons given by the witness for making them.

6. That the signing of the depositions as read and corrected by the witness is hereby waived.

7. That J. Leslie Winnie, after duly certifying the depositions, shall send them by registered mail to Hon. Edward Smith, the Clerk of the District Court of the United States, Southern District of California, Central Division, at Los Angeles, California, for filing.

8. That the cost of the original transcript, exhibits, [831] attendance fees and notary's fees shall be borne in the first instance by plaintiff, but shall be eventually charged as taxable cost to the losing party.

(The following depositions, except that of Mr. Ralph Van Patten, and all proceedings herein except the examination of the witness Van Patten, were had at the office of Swift & Company, 503 State Street, Elmira, Chemung County, New York. The examination of witness Van Patten was had at witness' place of business, known as Van Patten Plumbing & Heating Co., Inc., located at 111 East Church Street, Elmira, New York.)

By Mr. Cuningham:

The depositions that we are about to take relate to two defrosting units or devices which are installed in this building in the sausage manufacturing room and the pickle room respectively. We have delivered to defendant's attorney five photographs which we intend to offer as illustrative of witnesses' testimony about these two installations, and also a simplified diagrammatic sketch showing generally the layout of each. It occurs to me that we might facilitate matters if we go downstairs now and inspect these two defrosting devices before calling any of the witnesses.

Mr. Lyon: That is a good idea. We will make the inspection and then come back.

(At this point the parties whose appearances are heretofore noted, in company with Mr. Louis V. Smith, hereinafter noted [832] as a witness, inspected the devices referred to by Mr. Cuningham and returned to the office, where proceedings were continued.)

(Exhibits 38 to 42 inclusive marked for identification.) [833]

LOUIS V. SMITH

called as a witness on behalf of the plaintiff, first being duly sworn, was examined by Mr. Cuningham, testified as follows:

By Mr. Cuningham:

Q. Mr. Smith, what is your name, residence and occupation?

A. Louis V. Smith, 1028 Caton Avenue, Elmira.

Q. What is your occupation?

A. I am superintendent of Swift and Company, Elmira, New York.

(Deposition of Louis V. Smith)

Q. You are superintendent of this plant here?

A. Yes.

Q. How long have you been superintendent?

A. Since September, 1941.

Q. In what capacity were you associated with Swift and Company, prior to becoming superintendent?

A. As shipping clerk.

Q. For how long have you been associated with Swift and Company?

A. Since November, 1933.

Q. I show you, Mr. Smith, a photostat of what purports to be an invitation or announcement, being two pages, and ask you to identify the original of that.

(Stipulated for the record that Mr. George A. Personius, [834] who is expected here, is the photographer and likewise the photostater, and will produce the original when he arrives.)

A. I would say this is a photostatic copy, accurately copied from the formal announcement at the time of the opening of this plant.

Q. I show you what is apparently the original printed announcement. Is that what you refer to?

A. It is.

Mr. Cunningham: I offer the original announcement in evidence as plaintiff's Exhibit 43. I will change that offer and offer the original and substitute the photostat. (Photostatic copy marked Plaintiff's Exhibit 43-a and 43-b).

Q. Plaintiff's Exhibit 43 contains the date of July 10, 1935. Was that the date of opening of this plant here?

A. That was the date of the formal opening.

(Deposition of Louis V. Smith)

Q. By that time was the plant complete?

A. Yes, sir, it was fully completed at that time.

Q. Do you include in your answer the refrigerating units and defrosters in both the sausage manufacturing room and the pickle room? A. I do.

Mr. Cunningham: May I interrupt the examination of Mr. Smith to let Mr. Personius tell us about these photographs so he can go?

(No objection, and witness Smith stands aside.) [835]

GEORGE A. PERSONIUS

called as a witness in behalf of the plaintiffs, first being duly sworn, and examined by Mr. Cunningham, testified as follows:

Q. Where do you reside?

A. Elmira, New York.

Q. What is your occupation?

A. Photographer.

Q. Do you have a place of business in Elmira?

A. Yes, sir, I do, on Baldwin Street.

Q. I show you what have heretofore been marked Plaintiff's Exhibits 38 through 42 inclusive, being five photographic prints. Look at them and tell me if you can identify them? A. Yes.

Q. Who made these photographs? A. I did.

Q. When?

A. Friday afternoon, February 16, 1945.

Q. Where?

A. In this building, on the second and third floors.

Q. Did you also print the exhibits that you have identified? A. Yes.

(Deposition of George A. Personius)

Q. You have the negatives in your place of business, [836] have you not? A. Yes, I have them.

Q. Were these photographs taken in the sausage manufacturing room and in the pickle cooler room respectively?

A. I would not know. I can't designate the names of the rooms.

Q. But you are sure they were taken at this plant Friday? A. Yes, sir.

Mr. Lyon: No cross examination.

LOUIS V. SMITH

recalled to the stand, and direct examination continued by Mr. Cunningham.

Mr. Cuningham: I offer in evidence Plaintiff's Exhibits 38 to 42 inclusive.

Q. Mr. Smith, I show you these exhibits and ask you to designate by reference to the exhibit numbers, which are written on the back, the particular room in which each photograph was taken.

A. This is Exhibit 38, and is in the sweet pickle cooler.

Q. I will write the word "pickle" at the bottom of Exhibit 38. Go right ahead.

A. Exhibit 39 is also in the same room, the pickle [837] cooler.

Q. I will do the same on Exhibit 39.

A. Likewise, Exhibit 40 is in the sweet pickle cooler.

Q. I have done the same on Exhibit 40.

A. Exhibit 41 is in the sausage manufacturing cooler.

Q. I will write the word "sausage" on Exhibit 41.

A. Exhibit 42 is in the sausage manufacturing cooler.

(Deposition of Louis V. Smith)

Q. I will write "sausage" on Exhibit 42. Are you familiar with the equipment shown in these photographs?

A. To a certain extent.

Q. Designate which you are talking about and describe it in your own words.

A. I don't know just how to describe it as I am not too familiar with the units.

Q. I will ask you a series of questions. Take first, the pickle room. Is cold water taken from the city mains and piped in over the refrigerator coils of the Carrier Cold Diffuser unit?

Mr. Lyon: Objected to on the ground the witness is obviously not qualified to answer the question, and further objected to as leading, he having stated he is not familiar with the structures.

Mr. Cunningham: That was not my understanding and I will ask him a preliminary question:

Q. You did state you were generally familiar with [838] these? A. Yes, sir.

Q. In your capacity as superintendent do you have occasion to inspect these two Cold Diffuser units occasionally?

A. If there were any trouble with them I would have to, yes.

Q. Have you done so on occasion during the four or five years you have been superintendent?

A. I have seen these units in operation but I have not had occasion to work on them or make any study of them so that I could figure I was any more than just familiar with the operation. I do know how it operates.

Q. You are referring to the defrosting apparatus?

A. Yes, sir.

(Deposition of Louis V. Smith)

Q. Tell us whether city water is run in through the pipes and over the coils in both these rooms?

A. Yes, it is.

Mr. Lyon: Objected to as leading.

Q. What is the temperature of that water generally?

A. I don't believe I could say.

Q. Is it just as it comes from the tap?

A. Yes.

Q. Can you tell us how that water is sprayed out over the refrigerating coils?

A. It comes in through what we call the spray pipe [839] which is perforated with holes on either side near the bottom of the pipe and water is sprayed from the pipe loosening the frost on the coils.

Q. Is that pipe inclined? A. Yes.

Q. Which way does it slope downward?

A. Toward the capped end of the pipe.

Q. Is there any provision for draining that spray pipe?

A. Yes. At the end of the pipe there is a hole in the bottom of the pipe.

Q. Does the water spray out substantially over the top surface of the coils? A. Yes, sir, it does.

Q. Is the pipe located about in the center, longitudinally, of the bank of coils? A. Yes, it is.

Q. Are these spray holes on alternate sides pointed downward toward the coils? A. Yes, they are.

Q. How is the flow of water controlled in the sausage room?

A. That is controlled from a valve directly outside of the unit.

Q. Is that valve shown in plaintiff's exhibit 41? [840]

A. Yes, it is.

(Deposition of Louis V. Smith)

Q. I notice an elbow leading into the housing, shown on Exhibit 41, and ask you whether that leads into the spray pipe as shown on Exhibit 42?

A. Yes, it does.

Q. If you want to shut the water off do you do so by means of this hand valve shown on Exhibit 41?

A. Yes.

Mr. Lyon: That is objected to as leading, and also on the ground that the witness is not qualified to answer that question.

Q. Can you tell us what this little projection is, substantially below that valve as shown on Exhibit 41?

A. That is a vent to drain the pipe.

Mr. Lyons: Objected to on the ground that the witness has not been qualified to answer the question.

Q. Is there any means of opening and closing that little vent or drain?

Mr. Lyon: Same objection.

A. Yes, there is. It is a screw type vent that can be loosened or tightened.

Q. When you tighten it you close it, and when you loosen it, you open it? A. Yes.

Q. Plaintiff's Exhibit 40, does that show the spray [841] pipe in the pickle room? A. Yes, sir.

Q. Is the operation any different in connection with this spray pipe in the pickle room than it is in the sausage room? A. No, it is not.

Q. In other words, it is the same substantially?

A. That is right.

Q. I show you Exhibit 39 and ask you to state what that shows?

(Deposition of Louis V. Smith)

A. That is the valve directly outside of the housing of the unit in the pickle room.

Q. Is that substantially the same type of valve as you have testified to in the sausage room as shown in Exhibit 41? A. Yes, it is.

Q. In addition to the hand shutoff valve does it also have a vent.

Mr. Lyons: Objected to as leading. A. Yes.

Q. Does that show more clearly in Exhibit 38 than it does in Exhibit 39? A. Yes, it does.

Q. Is that the same kind of a vent or drain you described in the sausage room? [842]

A. Yes.

Q. Exhibit 38 is a photograph of the pickle room installation? A. Yes.

Q. Will you tell us how these valves and vents are operated in defrosting both of these units?

A. In defrosting the one in the pickle cellar the valve and vent outside the unit housing are opened and left open and it is operated by a valve outside the cooler room.

Q. Is the vent always open?

A. In this line, yes.

Q. You mean the screw cap vent? A. Yes.

Q. Is the vent at the end of the spray header likewise always open? A. Yes.

Mr. Lyon: Objected to as leading.

Q. Is the operation different in any way in the sausage room?

A. Yes. In the sausage manufacturing room it is operated by a hand valve directly outside the housing.

Q. That is the little wheel valve shown in Exhibit 41?

A. That is right.

(Deposition of Louis V. Smith)

Q. What is the operation of the little vent directly below that valve in that exhibit? [843]

A. It is the same as the other. It is to vent that line to prevent water gathering and freezing in these pipes after defrosting.

Q. The hole at the end of the spray header near the cap is also always open in the sausage room, is it not?

A. Yes, sir.

Q. Do these photographs, exhibits 38 to 42 inclusive, correctly show these installations? A. They do.

Q. When were these installations made?

A. They were made prior to July 10, 1935, as shown on the formal announcement.

Q. Were they substantially the same then as they are today? A. Yes.

Q. Have they been in continuous operation since July 10, 1935? A. Yes, they have.

Q. Have they been used since that time just as we have seen them today during our inspection?

A. Yes, sir, they have.

Q. Has that use been commercial?

A. I don't understand the question.

Q. Has their use been in connection with your commercial operations here? [844]

A. Yes, it has.

Q. Has there been any secret about that use?

A. None that I know of.

Q. Have the employees had access to these Carrier Cold Diffusers? A. Yes.

Q. Could they look at them? A. Yes.

Q. No one has been cautioned to keep it secret?

A. No, sir.

(Deposition of Louis V. Smith)

Q. Who was Dan Cash?

A. He was a traveling refrigeration engineer for Swift and Company.

Q. Is he now dead? A. Yes.

Q. Was he the person in charge of the lay out of these defrosting pipes? A. Yes, sir.

Mr. Lyon: Objected to on the ground the witness has not been shown qualified to answer. He was a shipping clerk at that time.

Q. How long have you known Mr. Cash?

A. From the time I started with Swift and Company in 1933. How soon after that I met him I am not sure.

Q. When did he die?

A. I can't state that as a fact. [845]

Q. When did you hear of his death?

A. It seems to me it has been about a year and a half to two years.

Q. Was he in charge of the refrigeration layout at this plant in 1935?

By Mr. Lyon: Objected to on the ground the witness is not qualified to answer the question.

A. I could not state that for a fact. He worked on it and worked in here during that time.

Q. You know he was actively engaged here at that time? A. Yes.

Q. Where was Mr. Cash's office at that time?

Mr. Lyon: Objected to as immaterial.

A. He worked out of the construction department located in Boston.

Q. Do you mean Swift & Company's construction department? A. Yes.

(Deposition of Louis V. Smith)

Q. What address, if you know?

A. Faneuil Hall Square, Boston.

Q. Is that still the address of your construction engineers' office? A. Yes.

Q. Are your records kept there, construction records?

Mr. Lyon: Objected to on the ground the witness is not [846] qualified to answer the question.

A. I presume that they are.

Q. Did you receive a telegram this morning?

A. Yes, sir, I did.

Q. Can you produce it please?

(Witness produces telegram).

Q. Who sent you this telegram?

A. Mr. Walter Meyer.

Q. Who is Mr. Meyer?

A. District Superintendent of Swift and Company.

Q. Is his office in Syracuse? A. Yes.

Q. Did he send you this telegram in connection with a request you made through me last week? A. Yes.

Q. What was that request?

A. That a copy of correspondence be shown between the construction department, possibly Chicago or our district office, in regard to the installation of these Carrier units.

Q. This is part of the records of the construction department in Boston? A. That is right.

Statement by Mr. Cuningham:

Following a discussion with Mr. Smith on Wednesday of last week I got in touch with Mr. C. T. Richardson, who I am in- [847] formed is in charge of the construction office and the records in Boston. At my request he sent this telegram to Mr. Smith via Mr. Meyer in Syracuse.

(Deposition of Louis V. Smith)

I offer this telegram in evidence and ask to have it marked Exhibit 44.

(Exhibit marked.)

That is with the understanding, Mr. Lyon, that you except my statement subject to correction if error appear.

Mr. Lyon: That is correct. Having been around this circuit twice now I don't want to go again.

Q. By Mr. Cunningham: Can you tell me whether this telegram refers to the installation in the pickle room or the sausage manufacturing room?

Mr. Lyon: Objected to on the ground he is not qualified to answer the question.

Q. He is better qualified than someone else will be after reading the telegram. If you are able to state?

A. The manufacturing cooler.

Q. Which do you mean?

A. The sausage room.

Q. How did you so deduce from the language of the telegram that it is the manufacturing cooler?

A. That is where our manufacturing processes are handled and not in the sweet pickle room.

Q. Read the telegram?

A. (Witness reads:) [848]

"Answering your air mail letter June 12th reference refrigeration difficulties manufacturing cooler Elmira. Situation not much better today. Cooling unit equipped with water defrosting but necessary remove ice every two or three hours causing temperature fluctuations."

Q. What is the date of that telegram?

A. June 13th, 1935, at 4:20 P. M.

(Deposition of Louis V. Smith)

(Witness continues reading:)

"Advise recommendations refrigerating inspector Cash at Elmira. Will keep him there as long as necessary. If advice Goetz satisfactory leave Sunday or Monday."

Q. Who is Mr. W. C. Fuller?

A. He is the refrigeration engineer at Swift and Company, Elmira.

Q. How long has he held that position, approximately, if you know?

A. He held that position at the time I came to work here in 1933.

Q. Is he personally responsible for defrosting the two units here? A. Yes, he is.

Q. Who is Ralph Van Patten?

A. A local plumbing contractor.

Q. Was he active in any way in reference to the installation of the two defrosting devices? [849]

Mr. Lyon: Objected to on the ground the witness is obviously not qualified to answer.

A. Yes, at that time he was working here.

Q. At what time, Mr. Smith?

A. In 1935, I couldn't tell you the date but it was during that year.

Q. I show you a schematic diagram which I state for the record I had prepared since my visit here last week. That is designed to show the defrosting devices in both rooms. Look at that and tell me if it is generally a correct diagrammatic showing of these two devices?

A. Yes, it is.

Q. I direct your attention to the device bearing the legend "screw cap drain to floor" at the right hand side of the drawing marked "Section 'A-A' ". Will you tell

(Deposition of Louis V. Smith)

me whether that is an accurate showing of that screw cap drain?

Mr. Lyon: Objected to on the ground witness is not qualified to answer that question. He stated at the beginning of the examination he was not familiar with the structure of the devices. A. It appears to be.

Q. Is it your recollection that the screw cap drain in the sausage room is located under the hand valve as shown in this drawing?

A. It is in the sausage room. [850]

Q. Is it at an angle of 180 or 90 degrees from the axis of the handvalve?

Mr. Lyon: Same objection as previously stated.

A. It is at right angles. In this one in the sausage kitchen this screw tap valve is not directly under, as it is in the pickle cellar. It is to the side.

Q. As shown in Exhibit 39? A. That is right.

Q. In the pickle room? A. Yes.

Q. And the difference also appears from inspection on Exhibit 41? Is that right?

A. Yes.

Mr. Cuninghame: I offer in evidence this diagram.

Mr. Lyon: I object to its reception on the ground the document is incompetent, irrelevant and immaterial, and never formally proven or identified.

Mr. Cuninghame: It is offered for the purpose of illustrating the witness' testimony in pictorial form.

Mr. Lyon: I object to it on further ground that the witness stated he was not familiar with the construction.

Mr. Cuninghame: I will stand on the record and the witness-statement that he was generally familiar.

(Marked Plaintiff's Exhibit 45 for identification.)

(Deposition of Louis V. Smith)

Q. What is the temperature of the sausage manufacturing [851] room generally?

A. About forty degrees.

Q. What can you say of the temperature maintained in the pickle room?

A. That is considerably lower, from thirty-four to thirty-six degrees.

Mr. Lyon: Are those both plus temperatures?

A. Those are both above zero Fahrenheit.

Q. Does the temperature of these rooms ever drop below freezing?

A. They do on occasion when we are carrying any amount of meat stock and especially over the week-end when the coolers are closed and not being used.

Q. Is the temperature inside the refrigeration housing in both of these rooms below freezing?

Mr. Lyons: Objected to on the ground the witness has not been qualified to answer the question.

A. I would say that it was from the fact that it freezes on those coils.

Q. In defrosting is the refrigeration turned off?

A. Do you mean in the cooler?

Q. Yes. Is the compressor turned off?

A. Yes.

Q. Are the fans turned off also during defrosting?

A. No, they are not. [852]

Q. Is there any interval of time between the turning on of the compressor and the stopping of the flow of water for defrosting, in your usual practice?

A. Yes, there is.

Q. What is the purpose of that interval, if you know?

A. That is to allow any water in the pipes to be drained out and the pipes to be cleared.

(Deposition of Louis V. Smith)

Q. Is it also to allow the fins to drain?

A. I don't understand what you mean by the fins.

Q. I mean the refrigerator coil. To allow the water showered over them to drain off?

A. That is correct.

Q. Of what are the pipes made, of what material?

A. Those are lead pipes, or iron. They are iron, not lead.

Q. Is there a valve and vents means connected to them?

Mr. Lyon: Objected to as already asked and answered, and as leading. A. Yes.

Q. Is there also a drip pan with a self-draining conduit?

M. Lyon: Objected to as leading.

A. Yes, sir.

Q. Your answer applies to both the pickle cooler and the sausage room installations, does it not? [853]

A. Yes.

Q. Is that conduit made of metal?

Mr. Lyon: Same objection.

A. Yes.

Q. Where does that conduit lead, Mr. Smith?

A. Out of the pan underneath?

Q. Yes.

A. It leads across the floor to the floor drain.

Q. Where does the floor drain empty?

A. Into the sewer.

Q. When the water is shut off, either by the valve outside of the refrigerator room as is the case in the pickle room, or by the valve inside the sausage room, is air sucked through the little screw cap drain indicated on this

(Deposition of Louis V. Smith)

drawing, by the action of the water running out of the spray header pipe?

Mr. Lyon: Objected to as grossly leading and on the further ground the witness is not qualified to answer the question.

A. That I would not know. I could not answer that.

Q. Can the fans be turned off if you so desire, during defrosting? A. Yes, sir. [854]

Cross Examination

By Mr. Lyon:

Q. In the housing of either of these units while the fans are rotating and the system is in operation, there is, in the sausage room, forty degrees Fahrenheit blowing over the coils, and in the sweet pickle cellar air between thirty-four and thirty-six degrees Fahrenheit?

A. When the units are operating?

Q. Yes.

A. I am afraid I can't answer that question.

Q. The air in the sausage room is kept at forty degrees Fahrenheit, or thereabouts? A. Yes.

Q. That air is circulated through that room by these fans mounted in the cooling system to maintain that air at forty degrees, isn't it?

A. That is a question that I also cannot answer.

Q. Also you have never at any time measured the temperature of the air inside the housings of either of these units, is that correct? A. Yes.

Q. As a matter of fact, you have been in a market or store in the summer time and seen an exposed refrigerator pipe with frost on it in a room of 75 or 80 degrees, haven't you? A. Yes, sir. [855]

(Deposition of Louis V. Smith)

Q. Then your statement that the fact there was frost on those pipes indicated it must be below freezing was an error, was it not?

Mr. Cuninghame: I object to that.

A. I can't answer that question.

Q. The only basis for the assumption you made that the temperature inside the housing was below freezing, was because there was frost on the coils, is that right?

A. Yes, sir.

Q. In both of those rooms, the sausage and pickle rooms, isn't it a fact the water which is used is dumped out on the floor?

A. Yes.

Q. That water never freezes on the floor, does it?

A. I believe not.

Q. Therefore, isn't it a fact, that in both of these installations, taking for example the structure shown in Exhibit 39, and as it is shown in Exhibit 41, that the pipe beyond the valve, which you have stated to be a screw valve shown in Exhibit 41 for example, that that pipe remains full of water?

Mr. Cuninghame: What do you mean by "beyond"?

Q. Back toward the source of water as distinguished from the spray header.

A. I didn't get the first part of the question. [856]

Q. Isn't it a fact that this pipe between the source of water and the valve remains full of water?

A. I can't answer and know for sure. I don't know.

Q. Isn't it a fact, as you can observe from Exhibit 41, that this portion of the pipe in which the hand valve is located is inclined from the point where you see it enter the housing back to the point adjacent to the wall so the

(Deposition of Louis V. Smith)

point at which it enters the housing is higher than the point on the right hand side of Exhibit 41?

A. In other words you mean this appears to be higher in this picture than this point here?

Q. Yes.

A. This pipe crossing this way was originally—

Q. Just state what it is right now. You observed it this morning, did you not? A. Yes.

Q. Isn't it a fact that where the pipe enters the housing, it is higher than the part where the pipe takes off against the wall and at the elbow against the wall?

A. It appears to be very close to me, on this diagram.

Q. I will ask you to go down and measure this right now, if you are not able to answer from your observation this morning. Will you go down and measure how much higher this point of entering the housing is? [857]

Mr. Cunningham: Can't we do that later and go ahead with the cross examination now, to save time?

Mr. Lyon: It won't take any longer now than at some other time. I would rather have him go down and measure it now.

Mr. Cunningham: There is no question in regard to the pickle room, is there?

Mr. Lyon: You might measure them both.

Mr. Cunningham: In that we have reference to Exhibit 39.

Q. Have you got a level?

A. No, we have not.

Mr. Cunningham: Will it satisfy our difficulties here if we stipulate that there is presently a little slant in the direction indicated by Mr. Lyon's question, or testimony. I think Mr. Lyon was testifying for a while, in connection

(Deposition of Louis V. Smith)

with the sausage room installation, and exactly the reverse slant is true in the pickle room?

Mr. Lyon: No, it won't. Let's measure it.

(Witness Smith, Mr. Lyon, Mr. O'Hearn and Mr. Jarvis recess for the purpose of taking measurements; and upon returning, the examination is continued.)

Q. Which room are you talking about now?

A. The sausage room.

Q. The difference, was it not, was that the elbow next to the wall as shown in plaintiff's exhibit 41 is approximately [858] one and one-half inches lower than the elbow at the point where the pipe enters the housing? Is that correct? A. Yes.

Q. And in the pickle room, as shown in Exhibit 38, the elbow at the portion of the pipe where it enters the housing of the cooling unit was one-half inch higher than the elbow at the opposite end of the pipe in which the hand valve is mounted? Is that correct? A. Yes.

Q. Both of these are three-quarter inch galvanized iron pipes, are they not? A. That is right.

Q. In connection with the spray pipes as shown in exhibit 40, did you ever place a level on that pipe?

A. No.

Q. Do you know actually, then, whether it is horizontal or level?

Mr. Cunningham: Objected to as to form. You are asking the witness to speculate.

Q. Can you answer the question?

A. By sight, it is inclined.

Q. You have, however, never measured it by any method? A. That is right.

(Deposition of Louis V. Smith)

Q. You don't have a level? A. No. [859]

Q. You say that you became the superintendent of this establishment in September, 1941? A. Yes.

Q. Prior to that date had you ever actually inspected these two installations which are shown in photographs, exhibits 38 to 41 inclusive? A. No.

Q. Mr. Smith, in this same plant you have a below zero freezing room, do you not? A. Yes.

Q. How cold is that kept?

A. That depends on what product we have. That is not under my supervision and I don't have any occasion to follow the temperature of that. That is handled by whoever is storing the produce in the house and I can't say accurately what the temperature is at any time.

Q. You do know it is kept below ten degrees below zero?

Mr. Cunningham: I object to this line. It relates to another refrigerating unit, not the subject of the direct examination, and apparently totally irrelevant to this deposition.

Q. Can you answer that question?

Mr. Cunningham: I point out that Mr. Lyon is making Mr. Smith his own witness.

Mr. Lyon: Not at all. He was asked if he was the superintendent and familiar with all the structures in the plant. [860] That was the basis of his qualification and we are following through to see if that is the basis of his qualification.

Q. You do know that that room is kept below ten degrees below zero at many times?

A. I don't know that.

(Deposition of Louis V. Smith)

Q. You do know that it is kept materially below thirty degrees Fahrenheit, do you not? A. Yes.

Q. There is a refrigerating coil in that room, too, isn't there? A. Yes.

Q. It is a fact that meat is stored in that room under these various conditions and that the pipes there do frost up and that in order to defrost those pipes the meat is taken from the room, the pipes are sprayed with water by a hose, allowing the temperature to rise, and before any meat is put back in the room the temperature is reduced. Is that true? A. Yes.

Redirect Examination

By Mr. Cuninghame:

Q. Where is this freezing room you have just testified to?

A. On the second floor adjoining the manufacturing cooler. [861]

Q. Is that the storage room? A. Yes.

Q. What sort of refrigeration unit do you have in there?

A. I am not prepared to talk about that. I am getting into a refrigeration line that I am not familiar with.

Q. As I understand your testimony in response to Mr. Lyon, you use a hose to defrost that unit?

A. We have.

Q. Is that a rubber hose? A. Yes.

Q. How do you operate that hose?

A. I am not prepared to answer that.

Q. Do you have a nozzle on the end of it?

A. Yes.

(Deposition of Louis V. Smith)

Q. Do you spray it over substantially the entire plane of the top surface of the refrigerating unit?

A. I believe it is done that way.

Q. Is that hose self draining?

Mr. Lyon: That is objected to as calling for a conclusion.

A. I can't answer that.

Q. Where is the hose in relation to the unit? It is kept close to the unit? A. No. [862]

Q. You carry it into the cooler room and spray off the unit, is that is? A. Yes.

Q. You turn off the compressor while you are defrosting that unit? A. Yes.

Q. Do you turn off the fan? A. I don't know.

Q. Where does the water run that goes over those coils? A. To a floor drain.

Q. Where is the floor drain hooked up?

A. It goes into the city main.

Q. What controls the flow of water from the rubber hose? A. The city water pressure.

Q. Is there any valve or spigot?

A. There is, where the hose is attached to the city line.

Q. You turn that on and off when you want to have the water flow through? A. That is correct.

Q. Who measured those pipes which you have testified to on cross examination? Did you measure them.

A. No.

Q. Who did? [863]

A. Mr. Lyon.

Q. Mr. Lyon who is here in the room?

A. Yes.

(Deposition of Louis V. Smith)

Q. What type of measuring instrument did he employ, if you saw him measure them?

A. A wooden smoke stick.

Q. What is that?

A. A stick we use to hang a product on for smoking.

Q. What did he do? Describe, if you can, how he measured those, according to your observations? Take the sausage room first.

A. By placing this stick on the floor in an upright position under the elbow and on the pipe going into the unit and also by the same means and the same stick measuring at the elbow in the pipe next to the wall.

Q. Did he mark the stick? A. Yes.

Q. What did he mark it with?

A. A pencil, I believe.

Q. In each instance he rested the stick squarely on the floor, did he? A. Yes.

Q. Now, with respect to the pickle room, did he measure it in the same manner?

A. Yes, sir, he did. [864]

Q. But did he put the stick next to the place where the pipe enters the unit housing as distinguished from below the elbow?

A. I believe he measured it from the elbow.

Q. The elbow that turns toward the housing, not the one that turns toward and nearest the wall, is that correct? A. Yes.

Q. Did he also place the stick under the elbow that is nearest the wall? A. Yes.

Q. As I understand your testimony, as I recall it, it was to the effect there was substantially a half inch difference between the height at the point where the pipe

(Deposition of Louis V. Smith)

enters the housing and the height where the elbow nearest the wall is located. Am I incorrect in that understanding?

A. That answer I gave from observing the measurements on the stick from the points he had measured at.

Q. You don't recall his measuring the height at the point where the pipe enters the unit housing?

A. No.

Q. Did you, yourself, handle the stick?

A. No, I did not.

Q. But you watched Mr. Lyon do it? A. Yes.

Q. May I have those sticks? [865]

(Sticks produced)

Q. This stick which I am holding in my right hand has a mark "E" and a line just above it. Was it in the pickle room or the sausage room?

A. I think that was in the pickle cellar. I didn't see this mark in the sausage kitchen.

Q. By the process of elimination, was this other one used in the sausage kitchen?

A. That was used in the sweet pickle cellar. The one in your left hand was in the pickle room and the one in your right hand in the sausage room.

Q. What does the mark "E" on the one in my right hand signify, if you know? A. I don't know.

Q. Who put that mark "E" on there?

A. Mr. Lyon.

Q. About an inch above that is another mark. Do you know what measurement that is supposed to record?

A. No, I didn't see that one marked. I didn't see the "E" or any other letters put on there.

Mr. Lyon: You saw me put the lines on though, didn't you? A. Yes.

Was it in the pickle room or the sausage room?

(Deposition of Louis V. Smith)

Mr. Lyon: You saw the difference in elevation that you testified to, didn't you? A. Yes. [866]

Q. The one in my left hand also has a mark "E" on it. Did you see that put on? A. Yes.

Q. What does that signify, that mark "E"?

A. That is the first measurement we took, the one in the front.

Q. In the pickle room? A. Yes.

Q. That is shown by the mark "E"?

A. I can see it, but I don't know which he marked E, and B.

Q. I don't see any "B" on here.

(Mr. Lyon indicated a "B".)

Mr. Cunningham: I can't see it on there, but maybe there is.

(Witness Smith stands aside.)

Mr. Lyon: I will make a statement that I made these measurements in the presence of the witness Smith and Mr. O'Hearn, who watched me make the measurements. When I was finished Mr. O'Hearn said he was satisfied. The measurements the witness testified to are the difference in elevation and the actual measurements I found at the different points, I believe to the satisfaction of myself and the witness and Mr. O'Hearn.

Mr. Cunningham: The mark E is in each instance lower than the other mark? [867]

Mr. Lyon: It is not uniform on the two sticks.

The higher mark in each of the two instances is the point of measurement of the elbow directly outside of the housing of the two installations. The lower mark is

mark taken underneath the elbow at the opposite ends of the pipes.

Mr. Cuningham: You did not measure this point near the housing?

Mr. Lyon: I measured underneath the elbows in both cases.

Mr. Cuningham: But not at the point where the pipe enters the housing?

Mr. Lyon: I did not measure the pipe at the exact point of entry because there is nothing for comparison. It can be done if you wish. However, I am satisfied as to the difference in inclination.

Mr. Cuningham: I just want to be sure you are satisfied.

W. C. FULLER,

called as a witness for the plaintiff, first being duly sworn, and examined by Mr. Cuningham, testified as follows:

Q. Mr. Fuller, where do you reside?

A. 206 Grand Central Avenue, Elmira Heights.

Q. What is your occupation?

A. Engineer for Swift and Company, the Elmira branch.

Q. Are you in charge of maintenance at this plant?

A. That is right.

Q. How long have you had that position? [868]

A. About fifteen years.

Q. Were you employed in the same capacity in 1935?

A. Yes.

Q. Were you familiar with these defrosting devices in the sausage manufacturing room and the pickle room?

A. Yes.

(Deposition of W. C. Fuller)

Q. When were they installed?

A. They were installed in 1935 when the plant was built new.

Q. When was the plant opened, if you know?

A. I think the formal opening was July 10th, 1935.

Q. Were these defrosting devices installed and in operation at that date?

A. Yes.

Q. Have they been continuously in operation ever since?

A. Yes.

Q. Have you personally done the defrosting on both of these units?

A. Yes.

Q. That covers the period since installation took place?

A. Yes.

Q. Have these defrosting pipes or devices been in the same form ever since they were installed?

A. Yes.

Q. And you have observed them how frequently, on the [869] average?

A. At least once every day.

Q. How often do you defrost in the sausage room?

A. It varies under the load conditions. Approximately twice in twenty-four hours.

Q. How about the pickle room?

A. That varies more yet. Under the conditions right now we have not defrosted in there in two months. In the summer time probably once every twenty-four hours.

Q. You have a great deal of activity in the sausage manufacturing room?

A. Yes.

Q. Is that true of the pickle room?

A. We don't have any manufacturing in the pickle room and not much going in and out of there.

Q. What type of compressor is used in these two installations?

A. It is a Vilter twin-cylinder speed machine.

(Deposition of W. C. Fuller)

Q. About what suction does that have?

A. We operate from thirty to thirty-five pounds. Thirty-eight pounds.

Q. Is it a six by six ammonia compressor?

A. Yes, it is.

Q. What is the temperature of the sausage and pickle room respectively? [870]

A. In the sausage room we operate around forty to forty-five degrees and in the pickle cooler from thirty-three to thirty-six degrees.

Q. Do either of these rooms ever drop below freezing on week ends? A. Only on rare occasions.

Q. What generally are the dimensions of these two rooms? A. I never measured them.

Q. Which one of these two rooms is bigger?

A. The sausage manufacturing cooler is the larger.

Q. Would you say it is twice as big?

A. No, I would say maybe a third larger.

Q. With reference to plaintiff's exhibit 45, can you tell us whether that generally shows the lay-out of the defrosting pipes in both of these rooms? A. Yes.

Q. Describe in your own words how that defrosting unit operates.

A. It is three-quarter inch pipe drilled full of holes pointing slightly downward, hooked to the regular city water line, and it defrosts by the city water.

Q. Is the water at the same temperature that it comes from the line? A. Yes. [871]

Q. How do you turn the water on and off for defrosting purposes, in the pickle room?

A. A hand shut-off valve operated from outside the pickle cooler room.

(Deposition of W. C. Fuller)

Q. How about the little cap vent or drain in the pickle room, shown on this drawing, exhibit 45?

A. We leave the cap open.

Q. Whether or not you are defrosting?

A. Yes.

Q. Is the same true of the little cap drain in the sausage room?

A. Yes.

Q. Can these drains be closed?

A. Yes, the caps can be closed.

Q. How do you operate them to close them?

A. They screw up with your fingers.

Q. Do you screw them down to open them?

A. Yes.

Q. What controls the water in the sausage room?

A. In the sausage room, when we defrost there we use the valve located just outside the unit.

Q. The valve is located within the sausage room?

A. Yes.

Q. Does that admit water to the pipe marked "single spray header" in this diagram? [872]

A. Yes.

Q. Is that pipe perforated?

A. Yes.

Q. Describe the spray holes in that pipe.

A. There are two lines of holes in it, one on each side, pointed practically downward.

Q. Are they about two inches apart?

A. Approximately.

Q. On opposite sides?

A. Yes.

Q. Are there more than two holes in the pipe?

A. Yes.

Q. A long series, as shown in the drawing?

A. Yes.

(Deposition of W. C. Fuller)

Q. At the capped end of the pipe is there any drain provided in both of these rooms? A. Yes.

Mr. Lyon: Objected to as grossly leading.

Q. Will you describe that drain?

A. It is a small hole in the very bottom of the pipe near the cap.

Q. Is the operation of this spray header in the sausage room substantially as shown in plaintiff's exhibit 42?

A. Yes.

Q. I ask you the same question with respect to the [873] pickle room as shown in exhibit 40?

A. Yes.

Q. I notice in plaintiff's exhibit 40, apparently a considerable spray of water is shown at the lower left hand corner of that picture. Can you explain what that is?

A. We have a short break in the pipe there, approximately one inch long.

Q. Does it interfere with the operation?

A. Not enough to do any hurt.

Q. Does it give you a little better drainage?

A. Yes.

Mr. Lyon: Objected to as leading.

Q. How long does it take you to defrost the pickle room, on the average?

A. Approximately a half hour.

Q. How about the sausage room?

A. About the same.

Q. Do you shut down the fans during defrosting?

A. No.

Q. Do you shut down the compressor?

A. Yes.

(Deposition of W. C. Fuller)

Q. Do you allow an interval of time to elapse between the discontinuance of the flow of water over the fin coils and the turning on of the compressor?

A. Yes. [874]

Q. About how long an interval in the pickle room?

A. From twenty minutes to a half an hour.

Q. Any different in the sausage room?

A. No, they are about the same.

Q. What is the purpose of allowing that interval?

A. To let the water drain out good from the unit and also to drain off from the floor as much as possible.

Q. Do you also let it drain out of the spray pipe?

A. Yes.

Q. What is the purpose of leaving open this little vent or drain below the valve in both cases?

A. To drain the pipes after we shut the water off.

Q. Is the temperature inside the unit housing below freezing generally in both cases?

Mr. Lyon: That is objected to on the ground the witness is not qualified to answer.

A. Yes, it is, under operating conditions, but when it is shut off it is not.

Q. Do you ever have any trouble with the pipe freezing up? A. Very little. It has frozen.

Q. Are you referring to both rooms?

A. No. Mostly in the sweet pickle room.

Q. Is that little break that we mentioned before in the end of the spray header in the pickle room due to freez- [875] ing? A. Yes.

Q. Does that interfere with the operation of that device as far as you have observed? A. No.

(Deposition of W. C. Fuller)

Q. How long has that break been in there?

A. I don't know. I didn't see it until one day last week.

Q. Do you take the front panel off the unit housing when you defrost, ever? A. No.

Q. Can you turn off the fans in both cases if you want to? A. Yes.

Q. Mr. Fuller, when the water is shut off here and here (referring to the two valves shown on exhibit 45,) does it run on through the spray header and drain off through the spray holes and lower drain near the cap?

Mr. Lyon: Objected to as leading.

A. Yes.

Q. As the water recedes down this pipe does it suck air through the screw cap drain? A. Yes.

Mr. Lyon: Same objection.

Q. Is there a drip pan in both of these? [876]

Mr. Lyon: Same objection, leading.

A. Yes.

Q. Does it, or does it not have a drain?

Mr. Lyon: Same objection.

A. Yes.

Q. Of what is the drip pan and drain made?

A. Galvanized metal.

Q. What are the pipes made of? A. Copper.

Q. These pipes coming down here (indicating on diagram) are of copper? A. Yes, sir.

Q. Mr. Fuller, in connection with the pipe shown in Exhibit 41, is that pipe slanted toward the wall as you have observed recently? A. Yes.

Q. It is downward from the housing to the elbow adjacent to the wall? A. Yes.

(Deposition of W. C. Fuller)

Q. Was that always the case?

A. No. It is normally very near level. Some of the hangars in back are loose letting this pipe drop down a little.

Q. In other words, it has sagged? A. Yes.

Q. How long has that been true? [877]

A. Quite some time.

Q. A matter of two or three years? A. Yes.

Q. Is the same true of the corresponding pipe in the pickle room which is shown best in exhibit 39?

Mr. Lyon: I don't know what the question means.

It is very indefinite and I object to it on those grounds.

Q. We will ask it again. Is the pipe likewise sagged in the pickle room? A. No.

Q. Can you say from your observation that it is substantially level? A. It is very near level.

Q. Is it so shown in exhibit 39 and 38?

Mr. Lyon: Objected to as obviously incompetent, and impossible to tell from a photograph whether it is level or otherwise. A. Apparently, in these photographs.

Q. These photographs are a correct showing of that pipe, are they not? A. Yes.

Cross Examination

By Mr. Lyon:

Q. How long ago was it, Mr. Fuller, that you first had occasion to take the front panel off of these cooler units? [878]

A. I took the panel off about two weeks ago.

Q. When, before that, had you taken the panel off?

A. Personally I had never taken it off before.

(Deposition of W. C. Fuller)

Q. Had you ever seen the inside of this installation before you took the panel off two weeks ago?

A. Not the top of the unit.

Q. You don't know what condition was inside the unit, then, prior to two weeks ago?

A. No. I never saw it, but I know that no changes have been made in it.

Q. But you never saw it before two weeks ago?

A. No.

Q. Then what you are testifying to here is what you saw of this structure when you took the panel off two weeks ago?

A. As far as the inside of it is concerned, yes.

Redirect Examination

By Mr. Cuninghame:

Q. Do you mean that in the last eight years you have never removed that panel from the top part?

A. That is right.

Q. Have you ever seen these pipes inside the housing until last week?

A. Not the spray header.

Q. Did you see them when they were originally installed? [879]

A. No.

Q. Under whose direction was that installation?

A. Mr. Dan Cash was in charge of the installation, I believe.

Q. Is he now dead?

A. Yes.

Q. Do you remove the lower panel on occasion?

A. No.

Q. Does anybody else handle these devices except yourself, here, at the present time?

A. Do you mean as far as defrosting goes?

(Deposition of W. C. Fuller)

Q. Yes.

A. Yes, the fellows in the sausage room defrost them, but I am the only one in the pickle room that does.

Q. Has that been true for the past eight years, eight or nine years? A. Yes.

Q. Do you know Mr. Button? A. Yes.

Q. Who is Mr. Button?

A. He is a fellow who used to work here at one time.

Q. Is he no longer working here?

A. He is not working here now.

Q. Did he ever defrost these units, if you know?

A. Not to my knowledge, no. [880]

Q. You have never had an occasion to take off that panel until this last week? A. That is right.

Q. Your units have operated perfectly for the past eight years? A. Yes.

(No cross examination.)

Mr. Cuningham: We have noticed Mr. Van Patten on the record and are endeavoring to get in touch with him. I suggest that we recess for lunch and see what can be done about getting him over here to finish this up.

Mr. Lyon: Are we finished with Mr. Smith?

Mr. Cuningham: I have a couple of questions.

LOUIS V. SMITH,

recalled for further examination by Mr. Cuningham, testified as follows:

Q. Mr. Smith, in connection with the pipe in the sausage room shown in plaintiff's exhibit 41, according to your observation has that pipe always been inclined downwardly toward the wall?

(Deposition of Louis V. Smith)

Mr. Lyon: Objected to on the ground the witness is not qualified to answer the question.

A. It was called to my attention just a short time ago that that was the case. I don't have any occasion to handle that work myself or to be there to notice anything like [881] that.

Q. Did you observe any loosening or breaking of the supports? A. Yes.

Q. Do you think that pipe has sagged due to such loosening? A. Yes.

Mr. Lyon: Objected to as calling for a conclusion.

Cross Examination

By Mr. Lyon:

Q. Is it not true that the first time you saw the inside of these installations was in the last two weeks?

A. Yes.

Q. You never saw it before that? A. No.

(Recess for lunch. Upon convening again at 1:30 p. m., the taking of depositions was resumed at the place of business of Ralph Van Patten at 111 East Church Street, Elmira, N. Y.)

RALPH VAN PATTEN

called as a witness for the plaintiff, first being duly sworn, and examined by Mr. Cuninghame, testified as follows:

Q. Your name is Ralph Van Patten? A. Yes.

Q. What is your residence address? [882]

A. 221 Coleman Avenue.

Q. Elmira? A. Yes.

Q. What is your occupation?

A. I am a journeyman plumber and steam fitter, but I am in the plumbing, heating and contracting business.

(Deposition of Ralph Van Patten)

Q. Where is your business located?

A. 111 East Church Street.

Q. Elmira, New York? A. Yes.

Q. How long have you been active in that business?

A. I have been here around eighteen years, close to eighteen years.

Q. Were you in the same business in 1935?

A. Yes.

Q. Did you in that year do any work at the Swift and Company plant in Elmira? A. Yes.

Q. What did you do there?

A. We had the contract for plumbing and heating in the entire plant.

Q. Did that work include the installation of certain defrosting pipes in the two cooling units in the sausage and pickling rooms in that plant?

Mr. Lyon: Objected to as leading. [883]

Q. Go ahead and answer. A. Yes.

Q. Did you personally install these defrosting pipes?

A. No, I didn't personally install them.

Q. Were they done under your supervision?

A. Yes, that's right.

Q. When was that work done?

A. Part of that was done before I was hurt and part of it was done after I was hurt up there.

Q. Let's limit the question to the little defrosting pipes, photographs of which I show you, being exhibits 38 to 42 inclusive. Do you recall when those pipes were installed?

A. I think both of those coils were hooked up before I went away from there.

(Deposition of Ralph Van Patten)

Q. Do you mean before your accident?

A. Yes, all the water pipe was running before I left.

Q. When was that accident?

A. I was looking up the date exactly and I went to the hospital on the 23rd day of February, 1935.

Q. You lost an eye, did you not? A. Yes.

Q. Is that how you date this installation of these particular pipes? A. Yes.

Q. Did you lose the sight of an eye on that job? [884]

A. Yes.

Q. Have you looked for and been able to find any records that would have a bearing on this particular job?

A. All I have here is a little card in back that I can show you that shows the end of the job.

Q. Would you show us that, please?

A. Yes. (Produces record card.)

Q. May I see the card?

A. Yes. If my brother was here he could find out a lot more for you.

Q. What is the date on there and what does it signify?

A. The last date is August 6th, 1935.

Q. Is that of significance with respect to when the job was completed?

A. This was for a little extra job that we done there after the contract was completed and it was paid on August 6th, 1935.

Q. I don't intend to offer that, but I would like to show it to my friends on the other side.

Mr. Lyon: All it shows are two entries: July 27, 1935, \$1.75; and August 6th, Folio entry C-32, a credit claim of \$1.75, and the name of Swift and Company, 363 State Street.

(Deposition of Ralph Van Patten)

Q. Mr. Van Patten, did you inspect these defrosting units at Swift and Company? A. Yes. [885]

Q. When?

A. I was up and looked at them last Friday morning.

Q. Did you observe any change in pipes or valves or vents that you recall having installed?

A. No, I saw no change in them.

Q. They appear to be generally in the same condition as when you installed them?

Mr. Lyon: Objected to as immaterial as to whether they appear "generally."

A. Yes.

Q. Who gave you the layout of these defrosting pipes?

A. Swift's foreman or superintendent on the job.

Q. Do you recall his name?

A. No. I can't think of his name. He was over to the hospital to see me twice.

Q. Does the name Cash mean anything to you?

A. No. He was quite a tall fellow and he was from the south.

Q. Is he over there now?

A. No. He is not there. He was just in for that job and went from there to St. Louis.

Q. Was he a Swift employee?

A. Yes, he was a traveling superintendent.

Q. Did he specify the valves and vents shown in these photographs? [886]

A. Yes, he gave us the layout and told us how he wanted it done.

Q. Did you install the drip pan or drain pan under this?

(Deposition of Ralph Van Patten)

A. No. I didn't do this. Whoever was doing the sheet metal work on the roof did that. It might have been Bartholomew and Hall.

Q. Do you recall from your inspection last week whether or not there is a drain in the floor of both the sausage and pickle rooms?

A. I don't think there is a room in the plant that don't have a drain. We put so many in.

Q. Are the floors always slanted toward the drains?

A. Yes.

Q. They are higher at the sides and lower toward the center of the room? A. Yes.

Cross Examination

By Mr. Lyon:

Q. What other work have you done for Swift and Company beside this?

A. That's all we ever done.

Q. Have you ever been back to repair any of this work?

A. No. We were supposed to have gone back to change the water line outside but I don't know what was done about it. [887]

Q. You never did any other work? A. No.

Q. How long has it been between last Thursday or Friday and the time you made this installation since you saw this installation?

A. I never saw it until the other day.

Q. You never even saw it when it was installed?

A. Yes, sure I saw it when it was installed. I was back on the job after I got back out of the hospital.

Q. When were you out of the hospital?

(Deposition of Ralph Van Patten)

A. I was in there about two weeks, then I was out about three and then I went back again for a couple more weeks.

Q. How long after you were out of the hospital was it before you went back to Swift's?

A. I think the second or third day afterwards I went up there.

Q. When you first saw this installation was the sheet metal plate over this unit?

A. No, I don't think they were. They were all knocked down for quite a while because we were running water on to them.

Q. Was that after you got out of the hospital?

A. Yes, they were still open.

Q. That was in August, 1935, then? [888]

A. No, that was not in August, 1935. This work I am telling you about was after the job was done completely.

Q. What was this job?

A. I can't tell you without looking it up. We had a regular contract and my brother was the bookkeeper at that time but you can't get hold of him now.

Q. Are you able to state that the spray pipe or valves or any of the structure has not been changed since 1935?

A. It looks exactly the same to me.

Q. Are you able to say there has not been any change or replacement there?

A. There has not been any unless a piece of pipe went bad or something.

Q. Do you know that this is the same valve?

A. Yes. They are Anaconda valves, we used them all through there.

(Deposition of Ralph Van Patten)

Q. How can you tell they are the same valves?

A. I take it for granted because they are the same as we left there.

Q. Would you know whether they had changed any particular piece of pipe?

A. I don't imagine they did.

Q. You don't know whether they changed the slope or inclination or direction of travel of these pipes, do you?

A. No. [889]

Redirect Examination

By Mr. Cunningham:

Q. How do you fix this date in February so accurately?

A. I found it up to the house, exactly when I got my bills from the hospital.

Q. Did you look this up? A. Yes.

Q. When was that?

A. While I was home yesterday.

Q. Is this valve (indicating on photograph) an ordinary plumbing fitting?

A. Yes, an ordinary Anaconda valve.

Q. Do you keep those in stock now? A. Yes.

Q. Have you got one of them handy?

A. Yes, I think I have one of them here.

Q. Let me see it if it is not too much trouble?

A. I haven't got a small one, but here is a bigger one. They were used all through the job.

Recross Examination

Q. By Mr. Lyon: Is this an ordinary gate valve?

A. Yes.

(Deposition of Ralph Van Patten)

Q. It is an inch and a quarter standard gate valve?

A. Yes.

Q. It has no vent in it, has it? A. No. [890]

Mr. Neave: The next series of depositions are those taken at Yamhill, Oregon. Mr. H. Calvin White of this bar took those depositions, and I will ask Mr. White if he will present those, your Honor.

The Court: Very well.

Mr. White: We have in this group five depositions.

The Court: I believe this is your first appearance in this case, is it not?

Mr. White: That is right, your Honor.

The Court: Does the clerk have your name?

Mr. Neave: Well, he is one of the attorneys of record in the case.

Mr. White: Yes, and this is my first appearance here.

Mr. Neave: He is one of the attorneys of record in all of the pleadings, your Honor. [891]

The Court: All right.

Mr. White: These depositions consist of those of Fred L. Trullinger, C. W. Eustice, Anton Broms, Mark A. Postlewaite, and C. W. Hulse. If the court would desire a general outline of the circumstances to which these depositions relate, it might aid the court in placing in the various events the significance of one deposition, that of Anton Broms, which we would like first to read into the record.

The Court: I don't have any desire about anything when I am trying a law suit.

Mr. White: I thought perhaps that what Mr. Broms had to say might clarify it.

The Court: Except in the matter of expedition and the saving of useless repetition of things that are perhaps technically material, such as a man's name and address, how long he lived here, and what he did on such-and-such a date, and so forth. Counsel have been summarizing those things and then taking the portions of the depositions which they considered material to the dispute here and reading them.

Mr. White: Yes. I think a general statement concerning what the deposition shows occurred up there and the relation of the parties will be helpful.

The Court: Go ahead. If Mr. Lyon sees anything wrong with it he will object, I suppose.

Mr. Lewis Lyon: I am particularly desirous of expediting [892] the trial in any way it can be expedited, but I don't think the statement of counsel as to what the depositions prove is evidence.

The Court: Including your statement?

Mr. Lewis Lyon: Including my own.

Mr. White: It was not my purpose to comment on anything relating to proofs of any consequence, but merely the general picture up there and who the parties were.

The Court: Go ahead with your statement. If there is anything wrong with it, we will let counsel interrupt you, or I assume he will interrupt you anyhow.

Mr. White: This series of depositions has to do with the installation of a refrigerating plant, specifically a locker plant made at a place called Yamhill, Oregon, about forty miles out of Portland, Oregon. The occasion for this installation was the desire on the part of two de-

ponents, Fred L. Trullinger, who with Mr. Eustice owned a general store in this community of Yamill, and who decided to install a locker plant. For that purpose the necessary building construction was made and arrangements were entered into with a company known as Electrical Products, Consolidated, which had its principal office in Seattle, with a branch office or branch office personnel in Portland, to install the necessary refrigerating equipment. So we have Trullinger and Eustice as the proprietors of the store and plant. The Portland [893] branch of Electrical Products was managed by C. W. Hulse. Working with or under him were an engineer, Mr. Mark Postlewaite, and an installation and service man, Anton Broms, who manually made the installation of at least the greater part of the refrigeration equipment.

That is all, I think, that is necessary in the way of general background to relate these people.

The Court: There is no objection to that statement, instead of reading all of it, is there?

Mr. Lewis Lyon: No.

The Court: I don't see how it could materially affect it. I mean, there have been thousands of refrigerating plants built all over the country,—

Mr. Lewis Lyon: That is correct.

The Court: —and what we are concerned with are the defrosting methods they used.

Mr. Lewis Lyon: That is correct.

Mr. White: Now, if the court will permit, we would like to read the deposition, the direct examination, first, of Anton Broms.

The Court: Do you have the originals?

Mr. Neave: They should be filed with the court. They were filed, and I don't know where they have disappeared to.

Mr. O'Hearn: They were here some time ago.

The Court: Very well. The clerk will find them. This is [894] what witness now?

Mr. White: Anton Broms.

The Court: And who is he, again?

Mr. White: He is the man who made the installation. He was the service man and made the installation on the job.

The Court: Very well.

ANTON BROMS,

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

By Mr. White:

Q1. Mr. Broms, will you state your full name and address, please.

A. Home address or business address?

Q2. Both, please.

A. Anton Broms; business address, 700 Southeast Hawthorne in Portland, Oregon.

Q3. In what business are you engaged?

A. Refrigeration Service & Sales, commercial.

Q4. Do you own that business?

A. Yes, sir; I am a partner in it.

Q5. What experience have you had in the past relative to refrigeration equipment?

A. I have had sixteen, pretty near seventeen years. [895]

(Deposition of Anton Broms)

Q6. What has been your activity during that time?

A. Service, installation and sales.

Q7. What do you mean by "service"? We are speaking always of refrigeration equipment.

A. Maintaining it, making it run when it won't run, and repairing.

Q8. What do you mean by "installation"?

A. Well, mostly on new jobs, installing them, hooking up the blowers or coils to the condensing unit, making it operate correctly.

Q9. Have you had during those years experience in the maintenance and installation of locker plants?

A. Yes, I have on quite a few different locker plants.

Q10. Will you elaborate and tell us more about your experiences, the types of equipment involved, and more concerning their installation.

A. Well, I have installed what they call brine diffusers, cold water diffusers, hot gas defrosting systems, and electrical defrosting systems. I installed the first locker plant, I would say, about nine or ten years ago at Klamath Falls.

Q11. Have you installed other plants since that date?

A. Oh, yes, installed some around.

Q12. Roughly how many?

A. Oh, ten; maybe fifteen.

Q13. What makes of equipment have you serviced and [896] installed?

A. The Carrier was the first one I installed, and I have installed Par compressors, and—what is the name of that outfit in St. Louis?—Marlo brine units—Recold water defrosting units for locker plants, Mills compressors.

(Deposition of Anton Broms)

Q14. Did you at one time work for Electrical Products Consolidated? A. I did.

Q15. Where did you work for that company?

A. Well, I did their installation work. I was in business for myself at the time, but I did their installation work. They were located out on about 30th and Sandy in Portland.

Q16. In what business was Electrical Products Consolidated engaged at that time?

A. Well, they were in the sign business as well as in the refrigeration business.

Q17. Did you have anything to do with refrigerating equipment working for Electrical Products Consolidated at the Yamhill, Oregon, store and locker plant of Trullinger & Eustice?

A. I did. I installed the job in the first place.

Q18. When you say "the job," will you state more specifically what you mean?

A. Well, we put in the condensing unit in the basement in the building that was hooked onto the Carrier cold diffuser, [897] and we also had a blower type coil in the pre-cooling room.

Q19. When you say "we", to whom do you refer?

A. I speak of the Electrical Products. I was working for them on the job.

Q20. Was any one else from Electrical Products working on the job?

A. Not actually working on the job. A man by the name of Hulse was out a time or two when I was working on the job, and also a man by the name of Neil—I don't remember his name.

(Deposition of Anton Broms)

Q21. Do you know Mr. Mark Postlewaite?

A. Yes, I know Mark Postlewaite.

Q22. Was he connected with this job?

A. Mark came onto the job just about the time we had it installed. That is, he came to work for the Electrical Products, as I remember it. I think he was out here once; maybe twice.

Q23. Have you today inspected the Trullinger & Eustice locker plant here at Yamhill? A. I have.

Q24. Will you describe the parts of that plant which were cooled by refrigerating equipment when you made the installation as you have testified, if those parts are still identifiable?

A. Well, they have the cold diffuser, they used to call it—I think they still call it that—that is in the [898] pre-cooling room. It is a ceiling type blower.

Q25. Let me interrupt, please. Did you install that ceiling unit?

A. Yes, I installed that at the same time.

Q26. What make of unit is it? A. Carrier.

Q27. And what type?

A. Well, the type—the only way I can tell you the type is I copied the numbers off of the type. I think that is a 15-K, was the type of blower that that was.

Q28. Was any other refrigerating unit then installed?

A. The big floor type cold diffuser was installed in the locker plant—not in the locker plant; just outside the locker plant.

Q29. What do you mean by the locker plant?

A. Where the zero temperature or thereabouts is maintained to hold the meat.

(Deposition of Anton Broms)

Q30. Do you mean the locker room?

A. The locker room.

Q31. When did you last see that Carrier diffuser unit? A. About fifteen or twenty minutes ago.

Q32. Can you identify it?

A. Yes, I think I could swear to it that that was the same one.

Q33. Does that unit carry any markings or identification? [899] A. It does.

Q34. Do you know what they are?

A. Well, one, of course—that could be done on any unit, I suppose, but one is a hole in the end of the housing.

Q35. No, I mean by markings a “Carrier” identification.

A. Oh, it has the “Carrier” label on it, stamp on it.

Q36. Have you inspected the label?

A. Yes, I have.

Q37. What did you find on the label?

A. Well, on the label you have got “15Q2-114”. That is the type. “Serial 2254A, Job S68619.”

Q38. You are reading from a slip of paper?

A. Yes.

Q39. What is that slip?

A. That is a slip of paper that I copied the numbers off of the cold diffuser that is in the locker room.

Q40. How long ago?

A. Oh, fifteen minutes; a half an hour, maybe.

Q41. When you first installed that diffuser unit where was it placed?

A. It was placed just outside of the locker room.

Q42. In what place?

A. In the pre-cooling room.

(Deposition of Anton Broms)

Q43. How do the pre-cooling and locker rooms, insofar as the room arrangement is concerned, compare today with their [900] arrangement when you installed this equipment?

A. They are the same today as they were then as far as the rooms in connection with each other are concerned.

Q44. How are they separated?

A. By a wall going to the pre-cooling room first, through the pre-cooling room and through another door into the locker room.

Q45. And the last mentioned door is in the wall separating the two rooms?

A. Separating the two rooms.

Q46. Now at the time you installed the Carrier diffuser where was it placed, in the chill or pre-cooler room?

A. It was in the pre-cooling room, just to the left of the door going into the locker room itself.

Q47. Where with relation to the wall separating the two rooms?

A. Up against the wall, or practically against the wall going into the locker room, the wall separating the chill room and the locker room.

Q48. Have you today inspected that diffuser unit?

A. I have.

Q49. And do you recognize it as being the original?

A. As nearly as I can say. I feel reasonably certain it is the original unit.

Q50. Will you please describe that unit. [901]

A. Well, it is what they call a floor type unit. The bottom part extends from the floor up to the bottom compartment. There are three compartments or three sections to it. The bottom compartment is open, and on the

(Deposition of Anton Broms)

bottom or open part is a drain pan, and just above this section is the coil section of the diffuser, and above this is the fan section of the diffuser.

Q51. Will you describe the coil section.

A. Well, it is a coil of copper tubing that runs through there with fins on it. I don't remember the size of it. It is a coil.

Q52. With fins on the pipe?

A. Fins on the tubing, yes.

Q53. How do the fins extend?

A. The fins are up and down, vertical.

Q54. And the coils run—

A. The coil itself is horizontal, with a return or bends on the end.

Q55. You spoke, Mr. Broms, of a drain or drip pan bottom section. What is the purpose of that section?

A. When the coil is defrosted it carries away the waste water or waste ice, or whatever it is, that melts off the coil.

Q56. When you installed this unit where was such waste water taken?

A. Went right down through the floor. As I remember it, [902] the drain on the drain pan is in the center of the drain pan, and we drilled a hole right down through the floor.

Q57. Then the drain pipe came down through the floor? A. Came down through the floor.

Q58. And from that point where did the drain pipe first go?

A. Well, to start with we never had anything coming out of the drain pipe, and I don't remember whether right then we ran it outside or if that was a little bit later.

(Deposition of Anton Broms)

Q59. What do you mean by "outside"?

A. Well, we ran it out where it came down through the floor. We ran it out over the basement door to the outside and dumped it outside of the basement on the ground.

Q60. Then did the drainage go through this pipe and just discharge out to the outside?

A. By gravity to the outside.

Q61. When installed as you have described in the pre-cooler room, the room also contained this ceiling unit of which you spoke? A. Yes.

Q62. Was the Carrier diffuser unit visible in the room?

A. You mean the diffuser for the locker room?

Q63. Yes. A. Yes, that was sitting—

Q64. I mean the third section.

A. Yes. That was sitting in the chill room or pre-cooling [903] room.

Q65. Was any provision made for defrosting the coil on this unit? A. We tried hot gas defrosting.

Q66. Mr. Broms, when you say "we", may it be understood that you mean that you personally did or took part in whatever you describe? A. I did, yes.

Q67. In the following, Mr. Broms, will you refer to what you did or what was done under your direction?

A. I will try to, but in my business down there I don't say "I". I say "we" all the time, and when I am working for somebody else I say "we". I may be doing it personally, doing the work myself, but I always refer to it as "we" as long as I am working for somebody, and the same way with my business down there. I don't say "I". I say "we."

(Deposition of Anton Broms)

Q68. For my purposes here, I merely want to make it clear that the things which you saw were—

A. What I did?

Q69. —what you did. A. That is right.

Q70. Will you describe this hot gas defrost system to which you referred.

A. Well, I can describe part of it. It wasn't satisfactory, and I said in the first place it wasn't satisfactory, but that [904] the idea of a hot gas defrost is to run the discharge gas back through the coil that you want to defrost. But to do that you have to have someplace to get some gas to run back there, and it won't do it without having something to draw your hot gas from.

Q71. Was that true of this Yamhill installation?

A. That is true of the Yamhill installation.

Q72. Did you try hot gas defrosting?

A. Yes, I tried hot gas defrosting.

Q73. What happened?

A. Well, I froze up one of the condensers and busted it, but I couldn't get enough heat into the coil to melt the ice off of the coil.

Q74. Do you recall approximately how long you worked on this hot gas defrosting attempt?

A. Well, I tried at different times. I was afraid of freezing the condenser on the machine, which finally happened, but I tried to draw a little bit to get a little hot gas, but I had nothing to draw hot gas from, so that it was a failure right from the start as far as hot gas defrosting.

Q75. How long did you attempt to make it work after you first started the installation?

A. I would say two or three days.

(Deposition of Anton Broms)

Q76. Upon finding that the hot gas defrost would not work what did you then do?

A. I came out there one morning and the coil was all [905] covered with ice, and the temperature was crawling up in the room.

Q77. You mean the coil was covered with ice?

A. The coil in the chill room that was cooling the locker room.

Q78. In the Carrier diffuser unit?

A. In the Carrier diffuser.

Q79. Yes. What other temperature did you refer to?

A. To the temperature in the locker room. We had started to pull the temperature down—I had—and the temperature was coming down nicely, and when I came out this morning the temperature had started to crawl up again. And I had to do something to get the ice off of the coil, because it was blocked so that the air would not circulate through, and when the air wouldn't circulate through you would not get any temperature in the room because you would not get any cold out into the room.

Q80. What did you then do?

A. Then I took a hose from outside and pulled the hose in there and took the peephole off of the side and squirted water over the coil and washed the ice off of the coil.

Q81. What did you do then with reference to the water defrosting?

A. Well, I went back home—this was in the morning, and I went back home that afternoon. I had a brilliant idea, and I took a piece of pipe and drilled it full of holes on one side, in a straight line on one side, very small holes in it, and as close together as I could get them in the pipe.

(Deposition of Anton Broms)

And I brought it back out the next morning and I drilled a hole in the housing of the cold diffuser for the locker room, and inserted the pipe in through that hole and fastened the far end with a clamp, a pipe clamp, to hold it in place in the center, and also so that it would drain out when the water was shut off. And on the outside of the housing I put an elbow with a piece of pipe in it that I would judge was twelve to fifteen inches long, and on this end of this pipe I put a hose coupling on and screwed the hose onto it, water hose.

Q82. What kind of a hose? A. Water hose.

Q83. Rubber hose?

A. Rubber hose, sprinkling hose, or whatever you might call it.

Q84. About what size? A. Five-eighths.

Q85. Five-eighths inch? A. Five-eighths inch.

Q86. Then what did you do with that hose?

A. Then I turned the water on. I had it hooked up on the other end on the water faucet.

Q87. Now describe the course of the hose beyond this pipe, [907] or this handle to which you referred. Where did the hose then go?

A. Well, it went out through the pre-cooling room door. I don't remember just where I connected it on outside, but there must have been a faucet there someplace that I hooked onto, but I know that I left the pre-cooling room door open, let the hose come in there, and then I turned the water on and I stood there with this piece of pipe that was twelve to fifteen inches long in my hand and rocked it back and forth so that the holes in the pipe would spray the water across the whole coil and wash the ice off of the coil that way.

(Deposition of Anton Broms)

Q88. Did you then do anything further?

A. Then I shut the water off and disconnected the hose and took it out. I saw that it worked so well that I made provisions downstairs. I put a stop and drain cock there and put the water on, ran up through the floor and hooked it onto the piece of hose that went onto the pipe.

Q89. When you say "downstairs" you mean in the basement?

A. In the basement, below the pre-cooling room.

Q90. From what source did you obtain the water?

A. Well, it came off of one of the lines—I hooked a piece of pipe onto one of the lines down in the basement. I don't remember just what the source was, but then I suppose it was city water. That is what they had down there. I cut a tee into the line and ran a piece of half-inch water pipe [908] over there to where I wanted to go up through the floor.

Q91. You used the city water supply?

A. City water supply.

Mr. Lewis Lyon: I withdraw the objection.

The Court: Does he fix a date as to when he did this?

Mr. White: The date when this was done is fixed by other testimony.

The Court: All right.

Mr. White: I am now reading from page 137:

Q. To what pipe was this valve to which you referred connected?

A. It was down in the basement under the pre-cooling room.

Mr. White: That is the question in the third line on page 137.

(Deposition of Anton Broms)

Mr. O'Hearn: Yes. That is the answer: It was down in the basement under the pre-cooling room.

Mr. White: That was followed by a second question:

Where did the pipe to which this valve was connected run?

Q94. Did you at any time observe the water which passed that valve?

A. I don't understand the question.

Q95. Did you yourself make any provision for water and source of water supply to this valve?

A. I did. [909]

Q96. Where did you get the water?

A. Off of the pipe down in the basement. There was a cold water pipe running across in the basement, and I cut a tee into that line and ran another piece of pipe over to where I wanted to go up through the floor.

Q97. Was that water pipe already in existence?

A. The water pipe was in there. If I might clarify that supply source—

Well, the only thing, I remember that I had to go and shut off the water supply coming into the building.

* * * * * * * * *

Q100. After you connected the stop and drain valve with the hose as you have testified, did you operate the water defrost system? A. I did.

Q101. What did you do in the course of operation of the defrost and the coil in the Carrier diffuser unit?

A. Shut the condensing unit off and shut the fan off in the cold diffuser, turned the water on down in the basement, and went upstairs and got hold of that pipe and pushed it back and forth.

(Deposition of Anton Broms)

Q102. Where did you turn the water on down in the basement? [910]

A. At the stop and drain valve that I had put in there.

Q103. When did you last see that stop and drain valve?

A. I don't know. I suppose right now I see it lying on the table.

Q104. I show you a corroded connection with pipe nipples and an elbow marked "1/2 Crane." Do you know what that is?

A. That is a stop and drain valve with an elbow and two nipples on it.

Mr. White: Do we have that exhibit here?

Mr. O'Hearn: We should have it here.

The Court: That was in this box?

Mr. O'Hearn: No, not that one. That was the Indianapolis exhibit.

The Clerk: It is right here, I think.

Mr. O'Hearn: It was in a large box, when I saw it last.

Mr. Neave: Mr. O'Hearn saw the exhibit in the clerk's office.

The Court: You mean the other day?

Mr. O'Hearn: The other day, your Honor. It was all in a cardboard box, a packing box.

That is it, your Honor, I think.

The Court: That is the Indianapolis deposition.

Mr. O'Hearn: Then it was in another box similar to that.

The Court: It may be in the clerk's office.

The Clerk: I will go up and see. [911]

(Deposition of Anton Broms)

Mr. Lewis Lyon: The originals of the depositions are not in the court room, your Honor?

The Court: They do not seem to be, according to the clerk.

Mr. Lewis Lyon: They ought to be found, if they have been filed. I don't know if they were filed.

Mr. O'Hearn: Yes, they have been filed.

The Clerk: They were filed.

Mr. Neave: Mr. O'Hearn checked all of the depositions and exhibits before the trial started, checked them in the clerk's office.

Mr. O'Hearn: That is right. [912]

The Court: I have noticed a lot of testimony about those valves but as far as the patent is concerned I cannot see much difference, whether it was a stop-and-waste valve or drains into the basin or sewer or where it drains. I may be wrong and I suppose at the appropriate time counsel will point it out to me.

Mr. White: This will be offered as the original valve used in the installation to identify it to the extent of what was put into the plant.

Q105. Will you describe how such a valve is operated?

A. Yes, sir. There is an adjustment or a little valve on the side of it that when you close the valve you open that and it drains the water that is in the pipe beyond the valve.

Q106. You refer to the brass—

A. Knurled brass.

Q107. Knurled knob on the side of the valve?

A. Yes.

Q108. The valve appears to have a stem without a handle. What was the function of that stem?

(Deposition of Anton Broms)

A. At the time there was a wheel on there, and the function of that stem was to open and close the valve.

Q109. When you opened and closed the valve, what did that do with reference to the water supply to the hose and spray pipe?

A. When you opened the valve the water went up into [913] the spray pipe, and when you closed the valve it shut the water off.

The Court: Where did he say he got this?

Mr. White: He removed it from the pipe.

The Court: Just before the deposition?

Mr. White: Yes.

The Court: All right.

Mr. Lewis Lyon: The witness said the first time he saw it it was sitting on the table in front of him.

The Court: That was the last time he saw it.

Mr. Lewis Lyon: But this witness hadn't testified that he removed it.

Mr. O'Hearn: Not yet.

The Court: All right.

By Mr. White:

Q110. All right. Now after you had manipulated the spray pipe, as you have described, about how long did that manipulation take, or about how long did you so manipulate the spray pipe?

A. Well, that would be a guess entirely, but I would say maybe ten to fifteen minutes.

Q111. And what determined the length of time which you would manipulate the spray pipe?

A. Until the frost was all washed off of the coil.

Q112. How was it possible for you to know that the frost [914] was washed off the coil?

(Deposition of Anton Broms)

A. There is an opening in the side of the cold diffuser in the third section, just above the center section coil, that you can open and look in on top of the coil. You can also look underneath through the opening there up at the bottom of the coil.

Q113. Did you observe the condition of the coil through that opening before a defrosting operation?

A. Oh, yes.

Q114. And how did the coil appear?

A. Appeared with a coating of frost over it.

Q115. To what extent?

A. Well, I don't know as to what extent. It was all covered with white frost. That is, of course the fins are in there, and the holes would not be tight because then no air—that is, the openings between the fins would not be closed tight because then the air would not go through, and the object was to defrost before that happened.

Q116. How close to closing those openings would the frost accumulation, within your observation, come?

A. Well, that depends on the fins' spacing entirely. One fin spacing, if it is a wide fin spacing, it might take up an eighth of an inch; might take up to a quarter of an inch.

Q117. But I mean in this particular unit will you give [915] us an idea as to the bulk of frost accumulation that you saw on the coil?

A. I would say about an eighth of an inch on the fins.

Q118. Then in order to get the proper sequence, is it correct that you stated that before starting defrosting—

Mr. Lyon: I think the witness ought to be allowed to testify.

Mr. White: All right.

(Deposition of Anton Broms)

Q119. After you observed the coil and decided to defrost it, what did you then do?

A. Shut the condensing unit down and shut the fan off in the cold diffuser.

Q120. What was the condensing unit? What was its function?

A. That is a compressor, otherwise called a compressor condensing unit. That is what pulls the hot gas down and condenses it back into a liquid form.

Q121. All right. Now, after the condensing unit and the fan were shut down what did you then do?

A. Turned the water on down in the basement on this stop and drain cock, and went upstairs and rocked this lever back and forth until the ice was melted off of the coil. Then I would go down and shut the stop valve off.

Mr. White: The stop valve being the one that you hold in your hand, and which I wish now to have so identified as [916] Plaintiff's Exhibit Y-21.

(The valve referred to was marked Plaintiff's Exhibit Y-21 for identification.)

Mr. White: Q122. You shut off the valve?

A. I shut off the valve and opened the drain.

Q123. Why did you open the drain?

A. To drain the water out of the line so that it would not freeze.

Q124. Why would it freeze unless drained?

Mr. Lyon: That is objected to as calling for a conclusion of the witness.

The Court: Objection overruled.

A. The temperature in the room, or in the cold diffuser, rather, was cold enough where it would freeze water in the pipe unless there was some way to drain it

(Deposition of Anton Broms)

out; and if you didn't open it at one end and let the air pass through and let the weight of the water drain itself, it would form a vacuum and not allow the water to drain out of the pipe.

Q125. Upon opening this bleeder, that is, the narrow bleeder in the side of the valve, did all the water drain out of the supply line and the spray pipe?

A. Yes, it would all drain out.

Q126. What would happen to any water in the perforated spray pipe? A. It would freeze. [917]

Q127. Did it freeze? A. It did not freeze.

Q128. Why didn't it? What happened?

A. The water that was in that—

Mr. Lyon: Objected to. The witness already stated that it froze.

The Court: Objection overruled. Go ahead.

By Mr. White:

Q129. Will you explain exactly what water froze?

A. Did I say that it froze or that it would freeze?

Mr. White: You said it would freeze.

Mr. Lyon: He said that it did freeze.

Mr. White: Read his answer.

(The record was read as requested.)

The Witness: It would freeze if the water stayed in there.

Q130. But did the water stay in there?

A. No water stayed in there.

Q131. What happened to it?

A. It drained out.

Q132. Out of the spray pipe?

A. Out of the spray pipe, as well as out of the hose that connected to the spray pipe.

(Deposition of Anton Broms)

Q133. How was it permitted to drain out of the spray pipe? [918]

A. By opening the knurled bleeder nut, as you called it, on the stop and drain valve, and that let the water come out down below, whichever way the weight was the most. The water would run out below there, and when the water was all out the air would go in and let it go up and drain out the other end of the line.

Q134. All right. When it drained out the other end of the line, where did the water drain?

A. Drained down into the drain pan on the cold diffuser.

Q135. What did it drain through?

A. Drained through this spray pipe that I had in.

Q136. Then through perforations in the spray pipe?

A. Yes, through perforations in the spray pipe.

Q137. One end of the spray pipe was inside the unit, was it not? A. Inside the unit.

Q138. Was that end opened or closed?

A. No, that was closed, with a cap on it.

Q139. After the water was permitted to drain from the line, then what did you do?

A. After it had drained off of the coil what I thought was necessary, then I started the fan in the cold diffuser in the locker room, and then I went down and started the condensing unit. [919]

Q140. Did you operate the defrost system as you described one or more times?

A. Well, I don't remember that, but then I think that I came out and defrosted it two or three times, and then I showed Mr. Eustice how to do it.

(Deposition of Anton Broms)

Q141. Did the water defrost system ever fail to defrost the coil? A. Not that I know of.

Q142. What was the appearance of the coil after the defrost operation?

A. When I saw it the coil was clean; no ice left on it.

Q143. Was that the condition of the coil after each time you operated it? A. After each time.

Q144. Did at any time within your knowledge water freeze in the spray pipe?

A. Not to my knowledge.

Q145. How could you tell?

A. Well, the only way I could tell would be that when I came out and turned the water on again it went right on through.

Q146. And therefore there was no water frozen in the hose? A. Apparently not.

Q147. Well, the water could only get to the spray pipe [920] through the hose; is that not correct?

A. That is correct.

Q148. Now, are you familiar with the metal shell temperature of this Carrier diffuser unit? What can you tell me about the temperature of the metal shell?

A. The temperature of the shell of the diffuser would depend quite a bit on the temperature of the cold air going through, which is different at different times.

Q149. All right. Now did you observe the temperature condition in the locker room while this water defrost system was installed?

A. Well, I suppose I must have observed the temperatures, but I don't remember. I wouldn't say now what they were. But then apparently they were satisfactory, because they were holding things in there all right.

(Deposition of Anton Broms)

Q150. How did the temperature inside the Carrier unit compare with the temperature in the locker room, if you know?

Mr. Lyon: That is objected to as calling for a conclusion of the witness; on the further ground there is no foundation laid for any such assumption or conclusion or opinion.

The Court: All he is asking him here is if he knows. If he knows, he can testify to it; if he does not know, he cannot. Objection overruled.

A. It would depend considerably on what the diffuser temperature is. As a rule there is a set differential—or [921] not a set differential, but depending on the expansion valve, on the size of the unit, and everything like that, as to what the temperature difference is between the coil and the air that is passing over it.

Q151. Do you know whether the air leaving the diffuser unit would be at a higher or lower temperature than the air entering it?

Mr. Lyon: That is objected to as calling for a conclusion of the witness.

The Court: Overruled.

A. Well, the air entering the cold diffuser is warmer than the air leaving it.

Mr. White: Q152. Do you know whether in this instance the temperature of the leaving air was above or below the freezing temperature of water?

Mr. Lyon: That is objected to as calling for a conclusion of the witness. The witness said he never recorded or took the temperature of any such air.

Mr. White: Strike the question, then.

(Deposition of Anton Broms)

Q153. In stating that you drained the water out of the line to prevent freezing in the spray pipe, is it not true that you must have anticipated possible freezing in that pipe?

Mr. Lyon: That is objected to as leading and suggestive and calling for a mere supposition or conclusion, and is incompetent, irrelevant and immaterial. [922]

The Court: Yes, it is.

Mr. White: I will strike the question.

Q154. Why did you drain the water out of the line?

Mr. Lyon: That is objected to as calling for a conclusion of the witness, as to why he drained it out.

The Court: That is asked and answered. He already testified he drained the water out of the line to keep it from freezing.

By Mr. White:

Q156. Mr. Broms, I show you a photograph marked Plaintiff's Exhibit Y-15 and ask you if you can identify what is there shown.

A. It looks very much like the stop and drain cock that I installed in the ceiling of the basement.

Q157. How does the stop and drain cock appearing in that photograph correspond, to the best of your recollection, with the stop and drain valve which you testified to using when installing and operating the water defrost system?

A. Well, it looks like the same kind of a stop and drain cock that I put in there.

Q158. We see in the photograph a run of pipe connecting with the elbow marked "X". To what location did that pipe run?

A. This long pipe that is connected with the elbow?

(Deposition of Anton Broms)

Q159. Yes. [923]

A. It ran back to the pipe that ran across the basement—I don't know—I would judge probably ten feet from there.

Q160. And what was the purpose of that pipe?

A. To supply water to the stop and drain and on beyond to the cold diffuser.

Q161. Does the valve marked "X" within the circle appear to be the same as the valve which we have here as Plaintiff's Exhibit Y-21?

A. I would say it was.

Q162. I am not sure whether I have asked this question, and therefore I want to get it in the record. Where did you get this exhibit, Plaintiff's Exhibit Y-21?

A. Well, I just took it off the pipe over in the basement.

Q163. This afternoon? A. This afternoon, yes.

Q164. There appears to be above the elbow a dark area in what appears to be a wall of some kind. Can you identify that dark area?

A. Well, it looks like the hole that I shoved down through the floor to run the water pipe up through.

Q165. Did you inspect that hole this afternoon?

A. I did.

Q166. How does the appearance of that hole correspond [924] with your recollection of the pipe you refer to as having been run up through the floor?

A. Well, it was right above where the connection was to the elbow going up there, and the hole was an odd-shaped hole. And I know why, because I had an awful time getting down through there, and I had to chisel out when I was going through there because the first hole

(Deposition of Anton Broms)

didn't come down straight, and I ran into timber, I think it was, or something in there, and I had to move the hole over to one side.

Q167. Therefore, the hole appears elongated rather than circular? A. That is right.

Q168. Now you referred to a pipe as having been run up from this elbow directly below the hole through the floor. Where did that pipe go?

A. Well, it went up just through the floor, and then I put a piece of hose on there that went onto the spray pipe in the cold diffuser.

Q169. That is the hose to which you referred a while ago as having been attached to the spray pipe?

A. That is right.

Q170. I show you another photograph marked Plaintiff's Exhibit Y-14 for identification, and ask you to identify the pipe marked "X."

A. Well, that is the elbow where the stop and drain [925] cock was fastened to.

Q171. Now this view shows what appears to be another pipe with a scroll "D" on it. Can you identify that pipe?

A. Well, it looks like the drain pipe from the cold diffuser.

Q172. Where does that run of pipe which appears prominently in the picture go with respect to the floor?

A. It goes up through the floor and into the bottom of the drain pan on the cold diffuser.

Q173. Where does that pipe go, it at all, with relation to the present location of the cold diffuser? I believe you testified that it is now in the locker room.

A. Well, it goes up to the bottom of the cold diffuser, to the drip pan.

(Deposition of Anton Broms)

Q174. That pipe "D" goes up through a hole in the floor, does it? A. Yes.

The Court: Pipe "D"? It isn't marked here.

Mr. O'Hearn: Here it is, your Honor.

The Court: That is Y-14.

Mr. White: We are now referring to Y-15, I believe.

The Court: That is "D"?

Mr. O'Hearn: Yes.

The Court: All right. That is the big pipe in the center of the picture, is that right? [926]

Mr. White: Yes.

The Court: All right. I think I have it. Mr. O'Hearn showed me the original here.

By Mr. White:

Q175. Will you compare the present location of the place where that drain pipe goes through the floor with your recollection of the location where the drain pipe went through the floor in the installation which you made and concerning which you have testified?

Q176. You spoke of running a drain pipe from the unit down through the floor; is that correct?

A. That is right.

Q177. How did you get the drain pipe down through the floor? A. I made a hole.

Q178. What size is that drain pipe, if you recall?

A. I don't recall.

Q179. You inspected the floor today, did you not, beneath the chill room? A. Yes.

Q180. Did you see any other holes that would take the drain pipe which you installed?

A. I don't remember whether I saw another hole there or not. I was just trying to think.

(Deposition of Anton Broms)

Q181. But you did drill a hole through the floor? [927]

* * * * *

Q182. Mr. Broms, I show you another photograph labeled Plaintiff's Exhibit Y-16 and ask you if you can identify what is shown in that photograph.

A. Well, it is a box arrangement that they have in the chill room.

Q183. Did you see it today?

A. I saw it today.

Q184. To what do you refer as the box arrangement?

A. Well, it covers the housing of the cold air pipe, apparently, that comes from the diffuser.

Q185. In pointing to the photograph you refer to the box structure from which apparently the pipe is extending? A. Yes, that is it.

Q186. That box structure appears to be against a wall at the right. What wall is that?

A. That would be the wall to the locker room, between the locker room and the chill room.

Q187. Is the room which we see here the chill room or the pre-cooler room?

A. The pre-cooling room; yes, sir.

Q188. Is that the room that, as you have testified, contained the Carrier diffuser unit? A. Originally.

Q189. Yes. Will you compare the location at the time [928] you installed it of the Carrier diffuser unit with relation to this box structure appearing in Exhibit Y-16?

A. The Carrier diffuser unit sat right below this box-like structure in the original installation.

Q190. How was the air taken from the locker room into the Carrier diffuser unit and discharged back into it, as you have testified? A. There was a hole—

(Deposition of Anton Broms)

Q191. When the Carrier unit was in operation in the pre-cooler room, how did it operate to cool, as you have testified, the locker room?

A. There was an opening cut through the wall.

Q192. Through what wall?

A. Through the wall between the chill room and the locker room that attached to the opening on the bottom of the cold diffuser. And there was another opening in the top through the wall between the chill room and the locker room at the top, where the cold air was ducted and passed through the wall into the locker room.

Q193. You say there were openings cut in the wall. Who cut those openings?

A. I imagine that the carpenter cut them. I don't remember.

Q194. Do you know pursuant to whose direction he cut them? A. No, I wouldn't say. [929]

Q195. Did you actually see the openings yourself?

A. Oh, yes; I saw the openings.

Q196. And where were they with reference to the photograph which you hold in your hand, Exhibit Y-16?

A. Well, the opening in the top was apparently right here near the ceiling, and this box-like affair covers probably most of it. The other opening was down at the bottom where it is covered now by a duct, apparently.

Q197. You examined the wall to substantiate what you now say? A. Yes.

Q198. When did you do so?

A. About an hour ago, or a little more.

Q199. I show you another photograph marked Exhibit Y-17 and ask you to identify the same, if you can.

A. Well, that looks very much like the Carrier diffuser that they have in their locker room over there now.

(Deposition of Anton Broms)

Q200. Is that the Carrier diffuser unit to which you have referred in your testimony? A. Yes, sir.

Q201. On the face of the unit directly above the name plate entitled "Carrier Cold Diffuser" I notice a diamond-shaped piece of metal. What is that piece of metal?

A. That is a peephole. You can push that to one side and look in and see the top part of the coil. [930]

Q202. Have you observed the top part of the coil through that peephole? A. I have.

Q203. Did you do so when you first installed the equipment? A. I did.

Q204. When did you last do so?

A. This afternoon.

Q205. How far toward the right inside the unit can you clearly see through that peephole?

A. See to the end of it.

Q206. What do you see there at the end of it?

A. Well, several things I saw there. There is a pipe strap in there fastened to the metal cross member of the unit.

Q207. Do you know anything about that pipe strap?

A. Well, it is apparently the same pipe strap that I put in there to hold one end of this water defrosting spray head.

Q208. What is the present appearance of that pipe strap?

A. Well, one end of it, is apparently fastened on there. The other end is hanging down, and it is all corroded or coated. I don't know with what, but it is all covered.

Q209. What is the shape of that pipe strap?

A. A U with two ears on it. [931]

(Deposition of Anton Broms)

Q210. To what is one end attached, as you have said?

A. To a cross member.

Q211. What do you mean by the cross member?

A. The cold diffuser unit is built in three different sections, set one on top of the other, and this is the cross member of the top section, the lower cross member of the top section, across the end.

Q212. In this same view you see a hand carrying a pencil pointing to a dark spot in the end of the unit. Can you identify that dark spot?

A. That is a hole in the shell, in the housing.

Q213. Do you know how it came to be there?

A. Apparently I put it there myself.

Q214. For what purpose?

A. To run this spray nozzle or spray pipe through over the top of the coil.

Q215. Do you recall which end of the unit the spray pipe was run in? By "end" I mean the narrow dimension.

A. Well, it was on the narrow end there, on the end of the spray unit.

Q216. Where we see the dark spot identified as a hole? A. Yes.

Q217. What is the location of the hole with respect to a horizontal line which apparently is a juncture between sections?

A. It is about three inches up, I would judge, from the [932] bottom of the top section.

Q218. How does its elevation compare with the point at which the strap is supported on the other side?

A. Well, it would be approximately three inches above—approximately.

(Deposition of Anton Broms)

Q219. For what reason was the hole drilled through at that particular location?

A. To give a drain to the spray pipe that I put in there.

Q220. To the best of your recollection, judging from today's appearance of the unit, is that the hole that you drilled?

A. I would say it was.

Q221. Now, Mr. Broms, how long after the water defrosting system was installed as you described did you remain on this job?

A. Well, I was off and on it probably a week.

Q222. When you then left the job was the Carrier unit visible or not within the chill or pre-cooler room?

A. It was visible in the chill room.

Q223. I show you a drawing and ask you if you can identify the same.

A. Well, this looks very much like a sketch I gave you on this. It has a little straighter lines than the sketch I gave you.

Q224. Is it a fact that this drawing was prepared by me [933] pursuant to your instructions?

A. That is right."

Mr. Lyon: That is objected to as calling for a conclusion of the witness. Certainly what you did according to his direction he is hardly competent to testify to unless he saw it done.

Mr. White: Oh, he can say what the sketch means, your Honor, without having seen it.

The Court: Oh, I think so. Objection overruled.

Q225. Did you tell me what to draw?

A. I gave you a sketch.

Mr. Lyon: The sketch is the best evidence.

(Deposition of Anton Broms)

The Court: Then here it is, Exhibit Y-22.

Mr. Lyon: No, that isn't the sketch.

The Court: It isn't?

Mr. Lyon: No.

Mr. White: Very well.

Q226. I will show you first a different paper captioned "Northwestern Refrigeration Company," and ask you if you can identify the same.

A. Well, that looks very much like a sketch I made. That is my signature on the bottom.

Q227. Is that the sketch that you gave me?

A. I would say so.

Q228. I call your attention to the fact that on this sketch [934] there are at the left two words written in pencil, one "Handle" and the other "Hose."

A. That is not my writing.

Q229. Very well. What does this drawing purport to represent?

A. Supposed to be a front elevation of the Carrier cold diffuser that is at Trullinger & Eustice's locker plant.

Q230. Is the drawing accurate and to scale?

A. No, sir. I wouldn't say it was accurate as to scale.

Q231. Does it show all the details?

A. Well, no, it wouldn't show all the details. It just gives a general idea of what it looks like from the outside.

Mr. White: May this be marked for identification Plaintiff's Exhibit Y-22.

(The drawing above referred to was thereupon marked by the Notary Plaintiff's Exhibit Y-22 for identification.)

Mr. Lewis Lyon: I beg your Honor's pardon. If that sketch is the one that this witness produced and it is marked Y-22, I was in error.

(Deposition of Anton Broms)

The Court: Yes. I think it is time to recess now. At what page are you?

Mr. White: Page 160, and we have just completed question and answer 231, and reference has been had to the marking of the Exhibit Y-22. [935]

The Court: Very well. We will recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same day.) [936]

Los Angeles, California, September 24, 1946, 2:00 o'clock P. M.

Mr. White: At the close this morning reference had just been made to Exhibit Y-22, and the record shows following that an objection by Mr. Lyon.

Mr. Lyon. That objection will be reserved until the offer is made. There wasn't an offer made at that time, your Honor.

The Court: All right. Proceed.

By Mr. White:

Q232. How does what is shown on this sheet, Exhibit Y-22, correspond to any description you may have in the past given me of that Carrier diffuser unit?

A. Well, it looks like an original sketch that I gave you.

Q233. The original piece of paper?

A. No, the paper is heavier than we use.

Q234. But what is shown on the paper is to your recollection the same?

A. Yes, I would say that it was the same.

(Deposition of Anton Broms)

Q235. Now I show you another drawing and ask you if it has any meaning to you?

A. Part of the drawing is the same, I would say, as the original sketch that I gave you.

Q236. Beyond that statement what does the drawing repre- [937] sent, do you know?

Mr. Lyon: That is objected to as calling for a conclusion of the witness.

The Court: Sustained.

By Mr. White:

Q237. How does that drawing compare with your recollection of the water defrost system to which you have testified as having been installed by you at Trullinger & Eustice?

Mr. Lyon: That is objected to as incompetent, irrelevant and immaterial, as to how this drawing prepared by someone else might compare with something.

The Court: Overruled.

A. It looks like the installation I made.

By Mr. White:

Q238. Mr. Broms, how does that drawing compare with any past verbal descriptions of yourself concerning that Yamhill installation?

Mr. Lyon: That is objected to on the ground the record speaks for itself and is the best evidence.

The Court: Sustained.

Q239. Have you in the past described it to me?

Mr. Lyon: That is objected to as calling for hearsay testimony.

The Court: Sustained. [938]

(Deposition of Anton Broms)

By Mr. White:

Q240. How does that drawing compare with what you explained to me?

Mr. Lyon: Same objection.

The Court: Same ruling. Sustained.

By Mr. White:

Q242. Referring to that sketch or that drawing, will you describe what may be shown thereon with respect to your recollection of your installation of the water defrost system to which you have testified?

Mr. Lyon: Same objection.

The Court: Same ruling.

Mr. White: Your Honor, the witness had testified that it looks very much like a sketch he made, that being under his signature.

The Court: We have the sketch here with his signature and that is something that somebody else drew. This is in the nature of argument. In other words, it is a conclusion that the lawyer draws from what somebody said.

The rulings will stand. Proceed.

Mr. White: I now offer the direct testimony.

The Court: I thought you just finished with the direct.

Mr. White: Yes.

Mr. Lewis Lyon: I will offer, and would like to read at this time, the cross examination of Mr. Broms. [939]

Cross Examination

By Mr. Lyon:

Q259. Mr. Brom, when this Carrier unit was located in what you call the pre-cooling or chill room, what was the temperature of that room, if you know?

(Deposition of Anton Broms)

A. Well, we tried to maintain it, I suppose, around 35 degrees; 35 to 38 degrees is what is generally used in a pre-cooling room.

Q260. Did it compare favorably with the temperature of that room today?

A. No. At the time we had difficulty because that cold diffuser let too much cold out of the shell into the chill room, and we had a hard time to keep it from freezing, to start with.

Q261. You endeavored, however, to maintain the temperature of that chill room above freezing; isn't that right? A. Yes, that is right.

Q262. Now isn't it true also that you had over the openings in the wall between the chill room and the locker room doors to close those openings, both inlet and outlet?

A. Not that I recall.

Q263. You don't recall any such doors?

A. No, I don't recall any doors.

Q264. You did not before endeavoring to spray water over the pipe close the inlet and outlet from the diffuser unit to [940] the locker room?

A. Not that I remember.

Q265. You don't remember say such things?

A. No.

Q266. Would you say it was not true?

A. No, I would not.

Q267. You just have no recollection of that?

A. I have no recollection of there being any doors on the job.

Q268. Did you ever take the temperature inside of the diffuser unit at any time during the time you were spraying water over the coils? A. No.

(Deposition of Anton Broms)

Q269. You have no way of knowing, then, the rise in temperature inside of the cold diffuser during the time the water was being sprayed?

A. No, I wouldn't have any way of knowing.

Q270. The water that was sprayed came through what sized pipe? A. Half-inch pipe.

Q271. It was a half-inch pipe. How many holes were there in the pipe?

A. I don't know, but there were lots of them.

Q272. You say you drilled them. How far apart were they drilled? [941]

A. I would say about an eighth of an inch; something like that. I don't remember exactly, but they were drilled about as close together as I could drill them.

Q273. What was the length of the pipe?

A. Well, roughly I would say about four feet.

Q274. And how large were the holes?

A. About a thirty-second of an inch, if I remember.

Q275. Were they all in a straight line?

A. As straight as I could make them.

Q276. Did you ever measure the amount of water that was sprayed over the coils during any interval of time? A. No, I never measured the water.

Q277. Did you ever measure the amount of water that came out of the drain during any defrosting operation? A. No, I never measured it.

Q278. Would you say that Mr. Eustice's or Mr. Trullinger's testimony that the drain water drained openly onto the ground floor of the basement was in error in the use of this system? A. I don't get the question.

Mr. Lyon: Read the question.

(Deposition of Anton Broms)

(Last question read.)

A. Well, it didn't drain, to my knowledge, on the floor of the basement. We ran it out through the door outside. [942]

Q279. Then you would say that their statement that it drained openly onto the basement floor was in error?

Mr. White: Counsel, in order for your question to be proper you must state the time within which you are referring.

Mr. Lyon: I am asking the witness the question.

A. Well, I couldn't say that it was in error, because it might have been there after I left, but before I left we ran the water outside.

Q280. You left this job about a week after you say you made this run?

A. I am just guessing at about a week. I don't know definitely how long it was.

Q281. Were you ever back to it before you came to look at it here?

A. I came through here once—oh, I don't remember how long it was afterwards, but it was quite a while afterwards; a year or more afterwards. I came through town here and stopped in there and looked at it.

Q282. And at that time they had changed the system over, had they not?

A. They had changed the system over.

Q283. And were no longer operating it?

A. Not with—

Q284. Now you testified—

Mr. White: Let's have the witness' answer to that.

A. Not with cold water. [943]

(Deposition of Anton Broms)

By Mr. Lyon:

Q285. They were using hot air then?

A. I think they were using hot air.

Q286. Now, Mr. Broms, you stated on direct examination that you had installed a Recold diffuser; is that correct?

A. That I have installed Recold diffusers?

Q287. Yes. A. Yes.

Q288. And those use water defrosting, do they not?

A. Some of them.

Q289. When did you first install a Recold diffuser unit using water defrosting?

A. I would guess about five years ago.

Q290. Did you ever install any other system using water defrosting? A. No.

Q291. You know, however, that those Recold water defrosters are successful in operation, don't you?

A. Oh, yes.

Q292. And sold in great quantities at the present time? A. Yes.

Q294. You never attempted to make another installation like the one that you made for Trullinger & Eustice, did you? A. Never did.

Mr. Lyon: That is all. [944]

Redirect Examination

By Mr. White:

Q295. Mr. Broms, you stated on cross examination that the Carrier unit in the chill or pre-cooler room let too much cooling in the room. What did you mean by that?

(Deposition of Anton Broms)

A. The cold coming from the shell or the heat going to the shell from the room, rather, because the shell was so much colder than the pre-chill room.

Q296. Then you at the time of its installation proposed to maintain, as I recall your answer on cross examination, a temperature of 35 degrees?

A. 35 to 38 degrees.

Q297. Did you succeed in doing so?

A. No, we had trouble because it would pull down too cold.

Q298. How do you know it did?

A. Well, according to their say-so.

Mr. Lyon: I move to strike the witness' testimony on the ground of hearsay, particularly with respect to the temperature of the room.

The Court: It may be stricken.

By Mr. White:

Q299. Did you personally see anything in the room indicative of lower-than-intended temperature?

A. I don't recall. [945]

Q300. But you do recall that the Carrier unit was openly exposed to the room?

A. Oh, yes. It was that.

Q301. You stated, I believe, that you called by the plant about a year after its installation, the refrigerating plant installation, by you. Do you know that that was exactly a year?

A. No, I don't know that. I just happened to be driving through here, and I just stopped in to see how it was. But I don't remember how long ago it was; that is, how long after the installation. I am just guessing that it might be a year.

(Deposition of Anton Broms)

Q302. You don't remember how long after it was?

A. No, I don't know how long. I am just guessing it was about a year afterwards.

Q303. But that is a guess? A. That is a guess.

Q304. You stated also that you did not use or install any water defrost equipment other than the equipment of Refrigeration Engineering after your making of the Trullinger & Eustice installation. Is that right?

A. I did not. Now, I can maybe change or correct that a little. I did not install any water defrosting system. We installed the brine spray, and he was having trouble keeping his brine to the right density so that it would not freeze on [946] the coils, and I suggested that he take a hose and wash the frost off.

Q305. If the occasion had arisen, so far as the operating characteristics of your Trullinger & Eustice water defrosting installation is concerned, would you have made another such installation?

Mr. Lyon: That is objected to as calling for a conclusion of the witness, and objected to as being of no probative value. I will ask a question on voir dire on that.

The Court: Sustained.

By Mr. White:

Q306. You have been continuously engaged in refrigeration over these years, have you not?

A. I have.

By Mr. Lyon:

Q307. And you have installed many refrigeration plants, haven't you? A. Yes.

Q308. And you have run into difficulty with defrosting in a great many of them, haven't you?

(Deposition of Anton Broms)

A. Oh, yes, you run into difficulties in defrosting with any of them. You do with the cold water defrosting, as far as that goes, if they don't wash it and take care of it, or any of the others. It has to be looked after. Do you want me to answer your question? [947]

Mr. White: Yes.

The Court: That was the question to which the objection was sustained. I sustained the objection to the question about what he would have done supposing something or other.

Mr. White: We are reading a later question, your Honor.

Mr. Lewis Lyon: It is the same question.

The Court: He came back and said, do you want me to answer your question. The objection to that is sustained.

Mr. White: I beg your pardon.

Q309. In stating that you installed no other water defroster than the Refrigeration Engineering type, did you intend to mean in any way that you refrained from doing so because of any lack of efficiency of the Trullinger & Eustice installation?

Mr. Lyon: That is objected to as calling for a conclusion of the witness.

The Court: Sustained.

By Mr. White:

Q311. But did the Trullinger & Eustice job, to the extent that you were familiar with your own installation, operate and serve its intended purpose? •

Mr. Lyon: That is objected to as calling for a conclusion of the witness.

(Deposition of Anton Broms)

The Court: I think that is probably admissible because the question is limited to the extent of his information and [948] knowledge. Objection overruled.

A. I would say that it did.

By Mr. White:

Q312. On the basis of your experience in this business? A. Yes.

Q313. Mr. Brome, I show you what appears to be a photostatic negative of a sketch signed "Anton Broms." Can you identify that sketch?

A. Well, that looks very much like the pencil sketch I drew and gave you. That is my signature on there. It looks like my printing.

Q314. Does that sketch diagrammatically represent your own independent recollection of the system?

Q315. Will you identify the parts which you labeled on that sketch?

Mr. Lyon: I think the sketch speaks for itself and is the best evidence of what is on it and labeled on it.

The Court: Overruled.

Mr. White: Proceed.

A. Well, starting at the stop and drain down in the basement, I went up through the floor with a piece of hose fastened onto the pipe that went to the spray pipe that was in the lower section of the top coil—or in the lower part of the top section of the cold diffuser.

Q316. Is that stop and drain valve so designed on this [949] sketch the stop and drain valve to which you testified today? A. Apparently the same.

Mr. White: Thank you. Let this be marked for identification as Plaintiff's Exhibit Y24.

(The document referred to was marked Plaintiff's Exhibit Y-24 for identification.)

Mr. White: That is all.

The Court: Any further cross examination?

Mr. Lyon: There was no further cross examination, your Honor.

The Court: The deposition will be in evidence. All of the exhibits offered except the one Y-23 will be admitted.

The Clerk: May I ask to have them named?

The Court: Those are Exhibits No.—No. 1 was not identified. The only things that were identified were Y-14—you are going to offer them all at the conclusion of the Yamhill depositions, are you?

Mr. White: Yes.

The Court: All right. I will wait until then.

Mr. White: The remaining depositions, your Honor, are somewhat lengthy and certain portions may be selected for reading into the record that might serve best to establish certain facts needed to supplement Brom's testimony, such as, for example, the time of the installation, temperature, etc.

The Court: Just proceed and state the substance of the [950] preliminary and read what you think is material to the issues.

Mr. White: In view of the question apparently raised in the defendant's pretrial brief as to whether the system operated satisfactorily, certain pertinent testimony may be read, if your Honor desires, into the record on that particular point.

The Court: I have no objection. It is your lawsuit, not mine.

The defendant raised the question in his pretrial brief that the Yamhill installation was an experiment and was not a satisfactory installation and was abandoned. That is the general position you take?

Mr. Lewis Lyon: That is correct, your Honor.

The Court: I suppose if we have any testimony relating to that—however, I take it that all of your direct examination you consider material to each of these witnesses?

Mr. White: That is true.

The Court: I did not mean that you did not consider material those things, but there are matters of introduction. We know now who those fellows were and that they owned it. I don't think anybody will challenge that.

Mr. Lewis Lyon: No.

The Court: I do not know that there is any challenge as to the general date of the installation, is there? [951]

Mr. Lewis Lyon: I don't think there is any evidence that establishes the date, your Honor.

The Court: Very well.

Mr. Lewis Lyon: There is a very material observation there that, as far as the system is concerned, there is no date that establishes the date of the change-over from hot gas to this other method or no date established as to when it was taken out.

The Court: I might offer this observation, that I think one of the most material things in the whole lawsuit is found in the first sentence of your patent involved: "My invention relates to low temperature refrigeration where space is required to be constantly maintained at temperatures below the freezing point of water."

Mr. Lewis Lyon: That is right.

Mr. White: First I will offer the direct testimony of Fred L. Trullinger, and from that I think it might be well to read into the record certain portions pertinent to the matter of temperatures, whether the installation operated satisfactorily and, since the point has been raised, why it was taken out.

The Court: Whatever you wish. Just leave out reading the introductory part.

Mr. White: Yes. I think these comments serve that purpose, your Honor. [952]

Referring to page 49 of the Trullinger deposition, with specific reference to temperature conditions existing in the locker room:

“Q231. Had you made any observations concerning temperature conditions in the insulated locker room before the insulated compartment wall was placed?

“A. No. We held it at about 10 above zero, and that is the way it always was, and I didn’t notice any difference—any change other than that we could defrost now and before we couldn’t.

“Q232. What is the basis for your statement that a temperature of zero to 10 degrees existed in the locker room?

“A. 10 degrees above zero. We had a thermometer there, and it was held at or near that. Of course, there was times when it might be higher or it might be lower, but that was the attempted temperature to be held.

“Q233. Did you personally read the thermometer?

“A. Oh, yes; many times.

“Q234. Can you compare the temperature in the insulated locker room and the temperature in the insulated compartment?

“A. No, I have no way of comparing that.”

The Court: In the previous deposition the terms "pre-cooling room" and "chill room" were used. Now this is the insulated locker room. Is that a different room?

Mr. Lewis Lyon: Yes. [953]

Mr. White: That requires, your Honor, some explanation. Counsel I believe will agree to this statement of the circumstances leading to the making of this insulated compartment without going through great lengthy testimony.

It has been established by Brom's statement that the diffuser unit was openly exposed in the chill room, and therefore that the temperatures became lower than those desired for the purposes of a chill room. That being the case, then it became necessary to isolate thermally the diffuser unit from the chill room, and for that purpose an insulated wall was built about the diffuser which then formed the insulated compartment.

The Court: Was that the pre-cooling room then?

Mr. Lewis Lyon: The pre-cooling room and the chill room were the same thing, and outside of that rooms, separated by a door and a partition, was a locker room which was separated from the chill or pre-cooler room, and this particular diffuser was put, not in the locker room in the 10 degree space, but in the pre-cooling room. And it is very interesting right here to note Mr. Trullinger's statement on direct examination that until they did something about trying to insulate that diffuser it wouldn't work at all, it would not defrost. That is in contradiction to Mr. Brom's testimony that the thing worked very successfully.

The Court: Is that in his direct testimony? [954]

Mr. Lewis Lyon: Yes.

The Court: You can read that then. Do you want to introduce it now?

Mr. Lewis Lyon: I will. He has read it, in fact.

The Court: I did not so understand it. I could not understand just what he was talking about because I got thrown off the merry-go-round here with this new room.

Mr. White: If you will refer, your Honor, to Exhibit Y-11, your Honor will see the general room arrangement.

The Court: Then there are only two rooms?

Mr. White: Properly speaking, there are only two rooms.

The Court: So the insulated chill room and the pre-cooling room are the same thing?

Mr. White: That is right.

Mr. Lewis Lyon: Are one and the same.

The Court: And the locker room is only the second room?

Mr. Lewis Lyon: That is right.

The Court: Are you going to read testimony showing when this was made into a separate room, or is that in the record?

Mr. Lewis Lyon: There isn't any testimony as to that.

Mr. White: Yes, that is testified to.

The Court: I received the impression from hearing the witness Brom's testimony that there were two rooms and there was one room where the cooling unit was located and an air jet went through in there, and there were some holes in the [955] wall that went to another room, and over those holes in the wall later a box was put, as evidenced by Exhibit Y-16.

Mr. White: That is correct.

Mr. Lewis Lyon: Yes.

The Court: Now, this Y-16 is what you now call the insulated locker room?

Mr. Lewis Lyon: No.

Mr. White: No, your Honor. Y-16 shows the wall condition of that room as it exists today. Broms referred by relation to the box structure which the exhibit shows as being on the wall, the previous and, in fact, present location, though the holes are closed.

The Court: What room is this in?

Mr. White: The diffuser, your Honor?

The Court: No, Y-16, that box, what room is that in?

Mr. White: That is in the chill room.

The Court: And in the insulated locker room?

Mr. White: That is right. It is in the chill room.

The Court: All right.

Mr. White: And I might say that the insulated compartment which formerly enclosed the diffuser is removed now since the diffuser has been moved, transferred into the locker room.

Mr. Neave: I think what may be confusing—I don't want to make confusion more confounded—is the fact that [956] this box that you see in Y-16 is part of the duct work and has nothing to do with what the diffusing unit was. It was underneath the box.

The Court: I knew that. I understood his testimony about that, but what I am trying to find out here is how many rooms there are and what they are. Now you just introduced something else, that the diffusing unit has been moved.

Mr. White: That occurred later on, your Honor, when the changeover to a warm air defrosting system occurred.

In other words, it is now possible to see the original diffuser formerly in the chill room but now in the locker room.

The Court: You mean when the depositions were taken?

Mr. White: When the depositions were taken.

The Court: The diffuser has been moved from the chill room into the locker room?

Mr. White: That is right.

The Court: By the diffuser you mean the refrigerating unit?

Mr. White: That is correct.

The Court: So that this picture Y-18 with the turkey on it here, that is now in the locker room?

Mr. White: That is correct.

The Court: And when Broms built it it was still in the room that was the locker room? [957]

Mr. White: No, it was then in the chill room.

The Court: But you just said that the two rooms were both the same.

Mr. Lewis Lyon: No.

Mr. White: No. The so-called insulated compartment occupied a section of the chill room.

If we may picture this: At first the diffuser stood openly exposed in the chill room adjacent to that wall which in the exhibit shows the box structure now present. Because of temperature conditions, cooling, excessive cooling of the chill room resulting from the open exposure of the diffuser, it was decided to insulate it from the chill room proper by placing about the diffuser this wall which extended from—

The Court: Broms didn't have anything to do with that.

Mr. White: That is correct.

The Court: That was done after he finished.

Mr. White: That is true.

The Court: Then they decided to change it again by moving the refrigerating unit out of the insulated compartment of the insulated chill room into the insulated locker room.

Mr. White: That came a great time later when the change to warm air came on.

Mr. Lewis Lyon: It came right after they failed to water defrost.

The Court: Your witness now is one of the operators of [958] the unit?

Mr. White: Yes.

The Court: What do you propose to prove by his testimony?

Mr. White: We propose to prove by his testimony his complete familiarity with the installation, and the deposition as a whole goes to establish his having authorized and personally supervised the building construction needed to form the locker and chill room.

Then later the installation of the refrigerating equipment, and his rather frequent visits to the plant to keep familiar with what was going on, his findings, observation, and that the chill room temperatures first were kept lower than desired for their intended purposes, his complete familiarity following that with the placement of the insulated enclosure about the unit, and his familiarity with what the plant was and did with respect to water defrosting from that time on.

In other words, he was one of the owners and made it his business to keep posted.

The Court: You read some testimony here that in the insulated locker room he had seen the thermometer register at 10 degrees above zero many times. That is just what you read, wasn't it?

Mr. White: That is true. [959]

Mr. Lewis Lyon: I read Question 231 and the answer to it, your Honor.

The Court: I do not have the deposition here.

Mr. Lewis Lyon: This is supposed to refer to the conditions after the insulation was supposed to be put around the diffuser room, around the diffuser or refrigerating unit at a time which is not established in the depositions, and where this witness says that before the insulation was put around there that they could not defrost.

The Court: You mean he previously said that?

Mr. Lewis Lyon: Yes.

The Court: You had better read the whole deposition, I guess.

FRED L. TRULLINGER

was thereupon produced as a witness in behalf of the plaintiff herein and, having been first duly sworn by the Notary Public, was examined and testified as follows:

Direct Examination

By Mr. White:

Q1. Will you state your full name and address.

A. Fred L. Trullinger, 3710 Wauna Vista Drive, Vancouver, Washington.

Q2. In what businesses are you engaged at present?

A. Businesses?

(Deposition of Fred L. Trullinger)

Q3. That is right. [960] A. A good many.

Q4. Would you mind stating them?

A. Well, I am in the seed business, wholesale and retail, at Portland, wholesale and retail in Seattle; I am in the general merchandising business at Yamhill, Oregon, and in the locker business out there also. I own that locker plant.

Q5. At Yamhill? A. At Yamhill, yes.

Q6. Have you had experience with locker plants other than at Yamhill?

A. Oh, yes; with my son's plants located here in Portland and at Milwaukee, at Multnomah, and Amity, Oregon.

Q7. What in general is your familiarity with those plants?

A. Oh, I helped to build them when I was on the job while they were being built, and I have operated them now for four years while he has been in the Army.

Q8. You are at least generally familiar with the refrigerating systems used to cool locker rooms?

A. Well, I am with the ones that we built, and I have noticed other makes. I know what ours is.

Q9. When you say "ours" you refer to what?

A. My son and myself.

Q10. The business at Yamhill is operated under the name of Trullinger & Eustice? [961] A. Yes.

Q11. How long have you operated that business, Mr. Trullinger?

A. In that present location since 1904.

Q12. Have you steadily maintained that business from 1904 up to the present? A. Yes.



